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II

THE MAKING

OF THE

ENGLISH CONSTITUTION

449–1485

BY

ALBERT BEEBE WHITE

PROFESSOR OF HISTORY IN THE UNIVERSITY OF MINNESOTA

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SECOND EDITION, COMPLETELY REVISED

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PREFACE

A TEXT in English constitutional history which is neither antiquated nor obscure has long been needed. It has been the author's ambition to meet this need. In preparing the present book, he has made three main assumptions: that a college text in history should be brief, and designed for the accompaniment of much collateral reading; that it is impossible in the medieval period, with which this volume is concerned, to combine the narrative of English history and an account of the making of the constitution; and that to follow rigidly either the chronological or topical arrangement in a constitutional history of England does violence to the nature of the subject. It has been taken for granted that the student will use some good text to acquaint himself thoroughly with the general history of a period before attempting to study its institutions; and, in the matter of arrangement, it has been the aim to show the general evolution of the English government as a whole, without, at the same time, artificially dividing the great topics into reigns or other time units. A constant compromise between the demands of chronology and the desire for continuity in the treatment of the theme in hand has been found necessary.

The emphasis throughout has been upon evolution rather than upon description. The purpose has been to furnish a logically satisfying account of the genesis of each institution as far as present knowledge permits—to show exactly how it has become what it is. This has made it necessary to hold steadfastly to a given line of argument and to shun many alluring, and perhaps profitable, bypaths; while, on the other hand, it has sometimes entailed an apparent interruption of the theme in order to develop a line of thought needed for logical completeness. More time has been spent upon origins than upon descriptions of finished products or upon definitions, in the belief that students should obtain much from detailed and special works which would clog a general account of institutional development.

On the basis of his experience as a teacher, the author has brought out a college text upon the English constitution which closes at 1485. At that date, the distinctively creative period, the period when the constitution was in the making, ended. In studying this period, it is possible and, indeed, essential to separate sharply between the work on the narrative and that on the institutions. Moreover, upon the English middle ages, the scholarship of the last generation has been especially active; but its work is at present in a complex and unformulated state, and the average student should not be directed immediately to the mass of monographs and detailed works of reference; he needs an intermediary and guide. The modern period, on the other hand, has not been primarily a period of creation; in it, the newly made constitution has been tested and developed, and institutional concerns have borne a very intimate relation to the events and conditions prominent in a general narrative; it lacks the long sequences of institutional evolution which characterise the middle ages. In studying it, the narrative and the constitution must be handled almost simultaneously, and its literature is much better prepared for the immediate use of the undergraduate. A text-book dealing with the constitution after 1485 should be a superfluity.

While it is the office of this book to present to students the results of scholarship and serve as an introduction to the writings of the leading authorities, the author is ready to claim that its general conception and construction are largely his own. There has been no attempt to make an ideal allotment of space to the several divisions of the subject. Here the author has been influenced by what he has regarded as *desiderata* in other texts and by the present state of knowledge. He has felt, for instance, that the judiciary has been slighted, while Maitland's work has made possible a treatment of it which cannot be accorded some other topics which have traditionally received more attention. Moreover, classes in English constitutional history ought to contain a good number of prospective lawyers. It seems hardly necessary to seek to justify the copious quotations from Maitland. If nothing further were accomplished than properly to introduce the student to this scholar's writings, the author would feel quite content. In general, there has been more of quotation than is customary; but it is believed that when an important or difficult point has been stated superlatively well, it is justifiable to use such statement in a work of this sort, especially if it originally appeared where it would not be likely to be widely ready by undergraduates.

The present volume has not undertaken the complete analysis or exposition of documents or provided any substitute for the first-hand study of documents in class. In the case of any given document, only its most salient feature, as bearing upon the matter under consideration, has been pointed out. The bibliography, it is hoped, contains most of the material likely to be of real service to undergraduates. The author here takes pleasure in acknowledging a debt, in the matter of bibliographical data, to Professor Gross's *Sources and Literature of English History*. The indebtedness to the works of Maitland, Stubbs, and Medley is apparent throughout, while, in particular parts, the obligation to other well-known authorities has been equally great. The author wishes to make an especial acknowledgment of what he owes Professor George B. Adams. It was Professor Adams who introduced him to the study of the English constitution, and whose influence determined him to make history his life-work; and, in the preparation of this book, he has received encouragement and invaluable suggestions from the same source. The author is also under obligation to Professors West and Anderson of the University of Minnesota for much kindly encouragement and counsel.

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NOTE TO REVISED EDITION

THE revision of this book has, obviously, as its main object to incorporate as much as is appropriate to a work of this sort of the scholarly production of the last seventeen years; and these additional years of teaching the history of the English constitution should make for wiser selection of material and emphasis. Also there has been a quite complete rewriting. The main changes or additions are these:

1 Treating pre-Conquest Norman institutions as coordinate with pre-Conquest Anglo-Saxon institutions, both being background and antecedent to English constitutional history, which began in full measure in 1066. This has been made the more feasible through Professor Haskins's researches, which have given some body to our knowledge of pre-Conquest Normandy. And in this connection it has seemed best to include a sketch of continental feudalism.

2. The recent work of Professor Tout and others in administrative history has made it possible to write a new section on the organs of administration, and to round out somewhat the treatment of the Council, bringing this aspect of government into better proportion to the law courts and Parliament. Also there is a fuller appreciation of what a commanding force in English history lay in the contending interests of England's peculiar aristocracy and the king.

3. There has been an attempt throughout to give due weight to the public or semi-public work of the

lower classes, work which they were doing largely under command of authority higher up, and which it is believed accounts to a considerable extent for the governmental competence which English peoples have shown in modern times. The detail of this work for the thirteenth century is the result of the author's research, and he may perhaps claim as his also the place and importance which are assigned to this aspect of English constitutional history.

4. Explanatory details, often in footnotes, have been added in many places. Not a few of these have been suggested by student questions, and have been collected through many years. Maitland's *Constitutional History of England*, which was published just too late to be used in the first writing, has been especially helpful here; also Professor Adams's more recent books and articles. These two scholars have remained to the author rich sources of fact and idea, though the latter's feudal contract thesis has not been so closely followed as in the first edition. Professor Adams's death a few weeks ago must here be mentioned as a very great personal loss and as removing America's chief student of English governmental history. It has been possible to include in the bibliography the title of his new book, which is now in press.

5. The "Suggestions for Collateral Reading" have been omitted. It is believed that the frequent footnote references and a bibliography containing many explanatory comments make this feature unnecessary. The bibliography has been compiled on the same principle as before, with the interest of the instructor as well as the student in view, with a bias away from traditional authorities, and with renewed obligation to Gross's *Sources and Literature of English History*. It is hoped that it has been brought reasonably well to date.

The author is grateful, for valuable suggestions, to Professor J. F. Willard of the University of Colorado; and to colleagues in the University of Minnesota: Professor N. S. B. Gras, Professor A. C. Krey, Dr. Faith

Thompson, and Dr. D. H. Willson, the last two of whom have read the entire manuscript. And it is specially pleasant to recall the great help which came from the years of association with Professor Wallace Notestein, when he and the author collaborated in the general course in English history at the University of Minnesota.

A. B. W.

ROWE, MASSACHUSETTS.

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A condensed but comprehensive presentation in topical form, based upon the best authorities.

—— *Original Illustrations of English Constitutional History.* London, 1910.

Documents grouped to illustrate important subjects, and "annotated throughout with extracts from other original material bearing on all important points." Latin documents untranslated, but copious marginal abstracts are furnished.

Mitchell, S. K. *Studies in Taxation under John and Henry III.* New Haven, 1914.

Morris, W. A. *The Frankpledge System.* New York, 1910.

—— "The Office of Sheriff in the Early Norman Period." *English Historical Review,* xxxiii., 145–175. London, 1918.

An excellent study of the sheriff when at the height of his power.

Muir, Ramsay. *Philip's New Historical Atlas.* London, 1911. 2nd edition. *Hammond's New Historical Atlas for Students.* New York, 1914. 4th edition, 1921.

Norgate, Kate. *England under the Angevin Kings.* 2 vols. London, 1887.

One of the best narratives of the last half of the twelfth century.

—— *John Lackland.* London, 1902.

—— *The Minority of Henry III.* London, 1912.

This and the preceding are continuations of the author's *England under the Angevin Kings,* but are works of greater scholarly value.

Oman, C. W. C. (editor). *A History of England.* 7 vols. London, 1904–1914. i., *From the Beginning to 1066.* By C. W. C. Oman. ii., *1066–1272.* By H. W. C. Davis. iii., *1272–1485.* By H. K. Vickers. iv., *1485–1603.* By A. D. Innes. v., *1603–1714.* By G. M. Trevelyan. vi., *1714–1815.* By C. G. Robertson. vii., *England since Waterloo.* By J. A. R. Marriott.

Oman, C. W. C. *The Great Revolt of 1381.* Oxford, 1906.

Pasquet, D. *Essai sur les Origines de la Chambre des Communes.* Paris, 1914.

An interesting account of the beginnings of the Commons' representation in Parliament to the end of Edward I.'s reign, embodying some of the more recent points of view.

Pearson, C. H. *Historical Maps of England during the First Thirteen Centuries.* London, 1869. 3rd edition, revised, 1883.

The maps are: Brittania Romana, Brittania Cambrica, Saxon England, Norman England, Monastic England. They bear the stamp of their author's originality and are accompanied by a valuable text.

Petit-Dutaillis, C. *Studies and Notes Supplementary to Stubbs' Constitutional History.* 2 vols. Manchester, 1908–1914. 2nd edition of vol. i., 1911.

A valuable addition to Stubbs' work, and a corrective to his conclusions on several matters of importance.

Pike, L. O. *A Constitutional History of the House of Lords.* London, 1894.

A work of great value; throws light upon related institutions and constitutes a history of the English nobility.

—— *A History of Crime in England.* 2 vols. London, 1873–1876.

—— *The Public Records and the Constitution.* London, 1907.

A lecture delivered at All Souls College, Oxford, at the request of the Regius Professors of Civil Law and Modern History. Contains an elaborate diagram illustrating the evolution, from the Norman king's court, of the chief courts and departments of government of modern times.

Plucknett, T. F. T. "The Place of the Council in the Fifteenth Century." *Transactions of the Royal Historical Society.* Fourth Series, vol. i., 157–189. London, 1918.

Pollard, A. F. *The Evolution of Parliament.* London, 1920.

Represents recent points of view on Parliament's history: the king's commanding part in its making, its aristocratic character, its undifferentiated powers. It is of value especially for the very late middle ages and for the Tudor period.

Pollock, Frederick. *The Land Laws.* London, 1883. 3rd edition, 1896.

Especially useful in explaining the changes after Edward I.'s time.

Pollock, Frederick, and Maitland, F. W. *The History of English Law before the Time of Edward I.* 2 vols. Cambridge, 1895. 2nd edition, 1898.

Has superseded all previous works on English law for the period which it covers, and, in its lavish comprehensiveness, goes far to supplement and correct the older constitutional histories.

Poole, R. L. (editor). *Historical Atlas of Modern Europe, from the Decline of the Roman Empire.* Oxford, 1902.

The best historical atlas. It contains about one hundred maps with explanatory text. Of these, seventeen relate to the British Isles.

—— *The Exchequer in the Twelfth Century.* Oxford, 1912.

The best work on the subject.

—— "The Publication of Great Charters by the English Kings." *English Historical Review*, xxviii., 444–453. London, 1913.

Putnam, B. H. *The Enforcement of the Statutes of Labourers during the First Decade after the Black Death, 1349–1359.* New York, 1908.

See also her "The Justices of Labourers in the Fourteenth Century,' *English Historical Review*, xxi., 517–538. London, 1906.

Ramsay, J. H. *The Foundations of England*, B.C. 55–A.D. 1154. 2 vols. London, 1898.—*The Angevin Empire*, 1154–1216. London, 1903.—*The Dawn of the Constitution*, 1216–1307. London, 1908.—*The Genesis of Lancaster*, 1307–1399. 2 vols. Oxford, 1913.—*Lancaster and York*, 1399–1485. 2 vols. Oxford, 1892.

"A very useful survey of the main facts of English history, if employed with caution. Devotes much attention to military and financial operations."—Gross.

Riess, L. "Der Ursprung des englischen Unterhauses." *Historische Zeitschrift*, xxiv. (neue Folge), 1–33. Munich, 1888.

Riess believes that the early representatives to Parliament were summoned primarily to inform the king of the condition of the local administration.

—— *Geschichte des Wahlrechts zum englischen Parlament im Mittelalter.* Leipsic, 1885.

A brilliant monograph. For a review of this and the same author's *Der Ursprung des englischen Unterhauses*, see *English Historical Review*, v., 146–156.

Robertson, A. J. *The Laws of the Kings of England from Edmund to Henry I.* Cambridge, 1925.

Texts, translations, and introductory notes.

Round, J. H. *Feudal England: Historical Studies of the 11th and 12th Centuries.* London, 1895. Reprinted, 1909.

Especially valuable for the essay on the introduction of knight service, upon which subject and the early effects of the Conquest in general Round is the leading authority.

Round, J. H. *Geoffrey de Mandeville: A Study of the Anarchy.* London, 1892.

The life of Geoffrey is presented as "the most perfect and typical presentment of the feudal and anarchic spirit that stamps the reign of Stephen." For a somewhat different estimate of the degree of anarchy prevailing, see H. W. C. Davis in *English Historical Review*, xviii., 630–641. Various matters of constitutional interest are dealt with.

—— *Peerage and Pedigree: Studies in Peerage Law and Family History.* 2 vols. London, 1910.

—— *The Commune of London and Other Studies.* Westminster, 1899.

These studies are mainly on the twelfth century. In *English Historical Review*, xix., 702–706, G. B. Adams contends that London was a *commune* in the technical, continental sense during a part of the reigns of Richard I. and John.

—— *The King's Serjeants and Officers of State, with their Coronation Services.* London, 1911.

Savine, Alexander. "Copyhold Cases in the Early Chancery Proceedings" [Henry VI.–Edward IV.] *English Historical Review*, xviii., 296–303. London, 1902. "Bondsmen under the Tudors." *Transactions of the Royal Historical Society*, New Series, xvii., 235–289. London, 1903. "English Customary Tenure in the Tudor Period." *Quarterly Journal of Economics*, xix., 33–80. Boston, 1904.

Seebohm, Frederick. *The English Village Community: An Essay on Economic History.* London, 1883. 4th edition, 1890. Reprinted, 1896, 1905, 1913.

A work which contained much new information upon classes and tenures in the primitive settlements and precipitated a long contest over the question of the freedom or servility of these settlements. In his later writing, Seebohm has modified his theory of the Roman origin of the English village community while holding to its essentially servile character.

—— *Tribal Customs in Anglo-Saxon Law.* London, 1902.

Starting with the conclusions reached in his *Tribal System in Wales*, London, 1895, 2nd edition, 1904, the author shows that tribal custom was one important element in shaping Anglo-Saxon institutions.

Select Essays in Anglo-American Legal History. 3 vols. By various authors. Compiled and edited by a committee of the Association of American Law Schools. Boston, 1907–1909.

Contains some of the most valuable studies in this field made by English or American writers.

Shepherd, W. R. *Historical Atlas.* New York, 1911.

Contains about a dozen maps of medieval England or the British Isles; also maps of England's possessions in France.

Stephen, J. F. *A History of the Criminal Law of England.* 3 vols. London, 1883.

This and Pike's *A History of Crime in England* are the most detailed works on the subject.

Stephens, W. R. W., and Hunt, William (editors). *A History of the English Church.* 8 vols. London, 1899–1910.

The best general account of English church history. The first three volumes, covering to the end of the middle ages, are by William Hunt, W. R. W. Stephens, and W. W. Capes, respectively. See also Walter Lichtenstein, *The Date of Separation of Ecclesiastical and Lay Jurisdiction in England.* Chicago, 1908.

Stubbs, William. *Historical Introductions to the Rolls Series.* Edited by A. Hassall. London, 1902.

This publication in one volume of the "historical portions of the late Bishop Stubbs' Introductions to certain volumes of the Rolls Series" contains invaluable material upon the reigns of Henry II., Richard I., John, Edward I., and Edward II. "No better judge of the value of Henry II.'s work ever lived; no historian has ever given us a truer and more forcible picture of King John."

—— *Lectures on Early English History.* Edited by A. Hassall. London, 1906.

Lectures 6, 7, 13, and 14 of his *Seventeen Lectures on the Study of Medieval and Modern History* (3rd edition, Oxford, 1900) deal with learning and literature at the court of Henry II. and the history of canon law in England.

—— *Select Charters and other Illustrations of English Constitutional History from the Earliest Times to the Reign of Edward the First.* Oxford, 1870. 9th edition, revised throughout, by H. W. C. Davis, 1913.

The best collection of constitutional documents for the use of students. The Latin documents are not translated.

—— *The Constitutional History of England in its Origin and Development.* 3 vols. Oxford, 1874–1878. 6th edition of vol. i., reprinted, 1903; 4th edition of vol. ii., reprinted, 1906; 5th edition of vol. iii., 1903.

While this great work is still the best general treatment of England's medieval constitution, many new points of view with respect to institutional origins have arisen and it cannot be safely used, especially in the earlier parts, without constant comparison with later work. The work of Gneist long stood near that of Stubbs both in scope and authority. As a foreigner, Gneist was impressed with the local origin of much in England's administrative system and the importance of the gentry, especially in the local government; these aspects of the constitution are emphasized in his books. During the last generation, Stubbs and Gneist have been supplemented by much valuable monographic writing, and Pollock and Maitland's great treatise on the history of English law touches many phases of constitutional history.

—— *The Early Plantagenets (1135–1327).* London, 1876. 5th edition, 1886.

An excellent short narrative of the period, containing much of value to the student of the constitution.

Taswell-Langmead, T. P. *English Constitutional History.* London, 1875. 8th edition, by C. Phillipson, 1919.

Especially valuable for the late middle ages and for the Tudor and Stuart periods.

Thayer, J. B. *A Preliminary Treatise on Evidence at the Common Law.* Part i., "Development of Trial by Jury." Boston, 1896. Reprinted with part ii., 1898.

The best general work on the jury; especially valuable for the institution's later history.

Thompson, Faith. *The First Century of Magna Carta: Why it Persisted as a Document.* Minneapolis, 1925.

Shows that for a century at least the Great Charter and the Charter of the Forest were documents whose provisions were regarded as of practical value and the bases of court decisions.

Tout, T. F. *Chapters in the Administrative History of Mediæval England. The Wardrobe, the Chamber, and the Small Seals.* 2 vols. London, 1920.

Has greatly increased knowledge not only of the little known Wardrobe and Chamber, but also of Exchequer and Chancery. These volumes, which cover through Edward II., are to be followed by two volumes, "in which it is proposed to carry on the subject to the revolution of 1399."

—— *The Place of the Reign of Edward II. in English History.* Manchester, 1914.

Establishes the importance of this reign in administrative history.

Traill, H. D., and Mann, J. S. (editors). *The Building of Britain and the Empire; a Record of the Progress of the People in Religion, Laws, Learning, Art, Industry, Commerce, Science, Literature, and Manners, from the Earliest Times to the Present Day.* By various writers. New illustrated edition. 6 vols. in 12. London, 1909.

First published under the title "Social England," London, 1894–1897.

Vinogradoff, P. *English Society in the Eleventh Century: Essays in English Mediæval History.* Oxford, 1908.

"Deals with military organization, jurisdiction, taxation, land tenure, manors, social classes. Much of the material relates to the periods before and after the eleventh century."—Gross. The author's *Growth of the Manor* contains a study of origins; his *Villainage* a study of the developed manor; this book the middle ground between, and throughout centering in a study of Domesday Book.

—— "Folkland." *English Historical Review*, viii., 1–17. London, 1893.

This article established the nature and significance of the long misunderstood *folkland.* See also his "Transfer of Land in Old English Law," *Harvard Law Review*, xx., 532–548. Cambridge, Mass., 1907. And "Romanistische Einflüsse im Angelsächsischen Recht, das Buchland," *Mélanges Fitting*, ii., 499–522. Montpellier, 1908.

VINOGRADOFF, P. *The Growth of the Manor.* London, 1905. 2nd edition, 1911.

Argues for the communal organisation of the primitive English township and its late manorialisation.

—— *Villainage in England: Essays in English Medieval History.* Oxford, 1892.

These essays deal mainly with the twelfth and thirteenth centuries, and constitute the best work on the medieval peasantry before the forces leading to the end of serfdom became dominant.

—— (editor). *Oxford Studies in Social and Legal History.* 3 vols. Oxford, 1909–1914.

WHITE, A. B. "Some Early Instances of Concentration of Representatives in England." *American Historical Review*, xix., 735–750. New York, 1914. "Was there a 'Common Council' before Parliament?" *Ibid.*, xxv., 1–17. New York, 1919.

—— and NOTESTEIN, W. *Source Problems in English History.* New York, 1915.

Of the medieval problems, two deal with important constitutional subjects (the origin of the jury and of the Commons in Parliament), and include some source material not available elsewhere in translation.

WILLARD, J. F. "The English Church and the Lay Taxes of the Fourteenth Century." *University of Colorado Studies*, iv., 217–225. Boulder, 1907. "The Scotch Raids and the Fourteenth-Century Taxation of Northern England." *Ibid.*, v., 237–242. Boulder, 1908. "Side-Lights upon the Assessment and Collection of the Mediæval Subsidies." *Transactions of the Royal Historical Society.* Third Series. vol. vii., 167–189. London, 1913. "The Taxes upon Movables of the Reigns of Edward I., Edward II., and Edward III." *English Historical Review*, xxviii., 517–521; xxix., 317–321; xxx., 69–74. London, 1913–1915. "The Assessment of Lay Subsidies, 1290–1332." *Annual Report of the American Historical Association for the Year 1917*, pp. 281–292. Washington, 1920.

These studies are a valuable contribution to the history of taxation in England.

ZINKEISEN, FRANK. "The Anglo-Saxon Courts of Law." *Political Science Quarterly*, x., 132–144. Boston, 1895.

A good brief correction of some of the older misconceptions. See also his *Die Anfänge der Lehngerichtsbarkeit in England.* Berlin, 1893. Valuable account of feudal jurisdiction, especially in the 11th and 12th centuries.

ABBREVIATIONS

ADAMS, G. B., and STEPHENS, H. M. *Select Documents of English Constitutional History*, referred to as A. and S.

Maitland, F. W. *The Constitutional History of England*, referred to as Maitland, C. H. E.

Pollock, F., and Maitland, F.W. *The History of English Law before The Time of Edward I.*, referred to as P. and M.

White, A. B., and Notestein, W. *Source Problems in English History*, referred to as W. and N.

INTRODUCTION

ENGLISH constitutional history is not national history; it is world history. The justification of its study does not lie in national consciousness or preference, but in the fact that through England's governmental story, and through that alone, can be known the advent into the world of one great side of man's attained civilization—political democracy.

Civilised man has drawn his religious inspirations from the East, his alphabet from Egypt, his algebra from the Moors, his art and literature mainly from Greece, and his laws from Rome. But his political organisation he owes mostly to English conceptions, and constitutional systems all over the world are studded with words and phrases which can only be explained by reference to the medieval English parliament.[1]

One easily undervalues the thing that is familiar. The principle of representation, habeas corpus, trial by jury, the rule of the majority, universal suffrage—such things we know from our youth up, and in this time, notable but not peculiar in its spirit of reckless waste of the past, they are often thought of as things rather easily dispensed with and replaceable by ready-made substitutes. Democracy is based on the idea that government is everybody's business—the hardest kind of obligation to enforce. It is amateur government for the vast majority, and men easily tire of being amateurs. It can only endure if people have an overwhelming conviction of its value; and its value can best be weighed and its working understood by

[1] A. F. Pollard, *The Evolution of Parliament*, p. 3.

a study of the long labour and suffering by which it has been wrought.

The field of general English history is divided into the following main divisions[1]:

a. Britain before the Roman occupation began, namely, before 55 B.C. This is practically prehistoric Britain.

b. Roman Britain, 55 B.C.–407 A.D.

c. England from the Anglo-Saxon conquest to the Norman Conquest, 449–1066.

d. England from the Norman Conquest to the end of the middle ages, the period when governmental institutions were in the making, 1066–1485.

e. The modern period, when through greater political self-consciousness these institutions were tested and developed, and in recent times greatly modified and extended.

Constitutional history has nothing to do with the first division, and very little to do with the second, from which latter period little or nothing that is found in the later English government came. Our institutional story has its beginning in the third division, the Anglo-Saxon period. It is exceedingly important to note, however, that it had its beginning also on the continent. Through the Norman Conquest its roots run back through Norman history to France and the Frankish Empire, and draw from the soil of the whole continental development since the fall of Rome, and from Rome itself. Thus in its fullest sense English constitutional history did not begin until the Norman Conquest, because, until that time, there were not present in England all the materials out of which the constitution was to grow. There were, then, two great introductory lines of development, two tap roots from which the later constitution drew, the one Anglo-Saxon and the other Norman, the one largely insular, the other continental.[2] The coming together of these through the violence of the Conquest was bound to result for a time in confusion and uncertainty, a period often identified with the first two Norman reigns. This period was short owing mainly to the vigour and governing genius of the Norman kings; and already under Henry I. we catch the familiar outlines of the new, permanent growth. Then follows the great period of constitution making. This book deals briefly and by way of introduction with the Anglo-Saxon and Norman background developments, takes account in cross-section summaries of the main tendencies in the short period of post-Conquest confusion, and comes to its main subject in the creative period following. It closes with 1485, when much of the structural growth had been completed and many generations of Englishmen had been trained in governmental work and responsibility. Full political self-consciousness, a new questioning of all grounds of authority, and the struggle for political liberty belong to the centuries following.

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[1] Strictly speaking, of course, there was no English history in the island of Britain until the coming of the Anglo-Saxons.

[2] But it should be noted here, and the point will be illustrated in the account which follows, that Anglo-Saxon institutions owed much to con-

To study the constitutional history of England means to study the origin and growth of those institutions which have to do with the government of the English people. It is true that nearly everything in a people's life has at least an indirect bearing upon the making of its government; but in the study of this subject it is a practical necessity to fix the attention especially upon certain phases of the people's activity. Probably no two scholars would agree as to just where the domain of constitutional history ends and that of such subjects as legal or economic history, political science or sociology, begins. Such agreement is neither possible nor necessary; there will always be debatable ground. But one cannot go far upon the wrong road, if he keep his eye fixed constantly upon the sole purpose of his study—an understanding of how the present English government has come to be what it is and how in recent centuries it has touched and influenced political thought and growth throughout the world.

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tinental influences. Yet, speaking broadly, this contrast between the insular and continental backgrounds holds true.

PART I

English and Continental Backgrounds

SECTION I

ANGLO-SAXON INSTITUTIONS. 449–1066.

1. **The Anglo-Saxon Conquest and its Problems.**—The Anglo-Saxon period is filled with problems. Maitland states an important truth about all early institutions in what he says of early law:

> The grown man will find it easier to think the thoughts of the schoolboy than to think the thoughts of the baby. And yet the doctrine that our remote forefathers being simple folk had simple law, dies hard. Too often we allow ourselves to suppose that, could we but get back to the beginning, we should find that all was intelligible and should then be able to watch the process whereby simple ideas were smothered under subtleties and technicalities. But it is not so. Simplicity is the outcome of technical subtlety; it is the goal not the starting point. As we go backwards the familiar outlines become blurred, the ideas become fluid, and instead of the simple we find the indefinite.[1]

Some reasons for the difficulty which all scholars find in understanding Anglo-Saxon, especially early Anglo-Saxon, institutions may be stated. There was an actual complexity of custom, pettiness of detail, and endless local variation. The people of those times neither thought clearly nor spoke with precision about their own institutions; they were incapable of broad generalisation or exact definition, and never thought of the possibility of saving labour and doubt by striving for greater uniformity and simplicity. Men were interested in the practical problems of a particular time and locality. These traits make any records, which they have left, very hard to interpret. And these records, as we now have them, are but odds and ends.

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[1] Maitland, *Domesday Book and Beyond*, p. 9.

A prominent feature of the Anglo-Saxon government, alike in the separate kingdoms and in England as a whole after the approximate union of these kingdoms, was a lack of co-ordination between central and local institutions. A great gap existed, which many Anglo-Saxon kings strove sturdily, but for the most part unsuccessfully, to bridge. At the centre were the king and the *witan*, strengthened in later times by the king's local officials, the sheriffs; in the localities, were those institutions and customs in hundred and shire, by virtue of which the people lived in some degree of peace and administered a rude justice. The local government was more important than the central; that is, most of the real governing was done by local means. To local institutions and customs, then, especial study must be given, not because they are interesting puzzles, but because their subject-matter lies at the root of our study.[1]

In order to understand how the early Englishmen governed themselves in their localities, we should be able to answer such fundamental questions as these: Were the majority of the men freemen or serfs? Was there a nobility? How was the land held? Did the people live together in villages or were they scattered? How were their local assemblies made up? Were there varying grades of assemblies, and, if so, how were they related? How were their laws made and how enforced? Though they might be multiplied, these inquiries show the kind of subject-matter and the important lines of investigation in the early Anglo-Saxon period.[2]

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[1] It will be seen that England is not alone concerned here, but that we are looking into some of the basic matters of the constitutional history of all Germanic peoples.

[2] It should be said in advance that our knowledge of all Anglo-Saxon local institutions is still incomplete, and that on many important matters

We deal here with the institutions of a country after a great invasion and conquest have taken place. An invading people has more or less completely displaced the former inhabitants. We must know at this point, at least in summary fashion, something of the condition of the people in Britain just before the conquest, something of the conquerors and the manner of their invasion, and the more immediate results of the contact of the two peoples. These three subjects will be briefly discussed in the order mentioned.

We cannot here consider at length the extent to which the native Britons had become Romanised during the four centuries in which Britain was a Roman province, or how much Roman law and custom survived the withdrawal of the legions.[1] Britain was the last of Rome's provinces to be gained and the first to be abandoned. Rome's famous capacity for assimilation declined rapidly not long after Agricola had finished his work; and, moreover, there were reasons why no great efforts were made towards a complete colonisation of the island: Britain was the most northern of the provinces, and while the comparatively level regions of the south, east, and midlands offered no great obstacle, the hill country of the west and north, even where it passed under Roman rule, was much less affected and retained a distinct Celtic element in its life throughout the Roman period. But the lowlands were Romanised; here prevailed "Roman town life, the peculiar gift of Rome to her western provinces." Besides the five chief municipalities on or near the sites of the later Colchester, Lincoln, Gloucester, York, and

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scholars are not in agreement. This book can attempt nothing more than to reflect the present stage of scholarship on these questions. If the problems themselves can be so stated as to be clearly understood, much has been done; and enough is now known so that an intelligible story of institutional development can be told.

[1] These questions have been long and hotly debated and the contest is not yet over. There can be no doubt, however, as to which side scholarly opinion is more and more favouring. The older, and, as it may be called, orthodox view seems likely to be sustained. It is essentially that given in the text.

St. Albans, there were some ten to fifteen country-towns which were a sort of provincial centres of the principal native tribes. Here Latin was spoken and most of the forms of Roman life observed, even to the laying out of the streets and the construction of the houses. In the country, there appear to have been the estates or villas characteristic of Rome, but leaving too scanty traces for positive statements about the agrarian system developed. Latin was spoken to some extent in many of the country districts—probably, in most of them, both Celtic and Latin. Many roads were made, some for military purposes, more for the uses of ordinary communication between towns. Migration to Britain was small. The distance was great, and the Romans did not like the climate. Traders came, but few of the upper classes, few also of the labouring class. The midlands were always thinly populated. When in the early years of the fifth century the troops were withdrawn, there was no great exodus of Roman inhabitants. It was rather that thereafter Rome sent no more protecting legions and guiding and controlling governors. The Romanisation of Britain was all along the same lines as in the continental provinces, but it is to be thought of as in fainter colours, less indelibly impressed. Only about a generation intervened between the abandonment of the province and the time when the conquest by German tribes, long threatening, began in earnest. It is wrong to suppose, as is often done, that all traces of Roman administration soon disappeared. There were bound to be attempts to continue the Roman forms. The Britons could hardly have done anything else. But they were trying to continue a system which was beyond them, and its decay and their weakness were sure to follow. Such a Britain, however willing to fight, could not be successful against a determined attack from any quarter.[1]

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[1] See F. J. Haverfield, *The Romanisation of Roman Britain* and *The Roman Occupation of Britain;* also his chapter on Roman Britain in *The Cambridge Medieval History*, vol. i.

Of the Angles and Saxons in their native land, little is known.[1] There is evidence that, before the conquest of Britain, the Angles had kings and a well-defined military class, and that they played the leading part in the undertaking. Probably other surrounding peoples besides the Saxons added to the movement; but only in the case of the Angles was there anything like a national migration.[2] It must often be repeated that the insular character of Britain has been one of the most important factors in the history of her people. That the Anglo-Saxons had to come over-sea made the Germanic invasion of Britain different from that of any other part of the Roman empire. The boats were small and the sea tempestuous, and however purposeful the movement may have been on the part of the fighting class, the number of invaders could not have been large at any one time.[3] Families, cattle, and household goods were probably left behind at first. It was only gradually and after much fighting that, precisely after the fashion of the Danes, four centuries later, the invaders became colonists and brought over what they would permanently need. We may well suppose that they were, for the most part, freemen, although the non-noble freemen probably did not come in great numbers until the fighters had gained a hold upon the soil. There would be small use in bringing slaves when plenty could be had from among the conquered Britons, and without doubt many wives came from the same source. It is also probable that, whatever minor class distinctions existed in the fatherland, the leaving old associations, a sea voyage in small boats, and settling a new country, where land was plenty but had to be fought for, had a levelling and democratising effect. Moreover, the invasion and conquest resulted, as they did also on the continent, in the weakening for ever of the bonds of kinship and the general kin organisation of the Germanic tribes, thus paving the way for newer forms of social and political life. The actual coming in of the Anglo-Saxons lasted over a century, and it was two centuries before the island was really conquered. That the invasion of Britain was very slow should be carefully noted, for it helps account for conditions in the succeeding period.

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[1] See Chadwick, *The Origin of the English Nation*, for valuable investigations of the original location of the Angles and Saxons and the early civilisation of the Angles.

[2] Chadwick conjectures that the invaders of southern Britain were called Saxons by the natives because of one or more reigning families there of Saxon extraction, and that, in general, Angles and Saxons were mingled in the invasion, the Angles probably constituting the nobility. Kent, the Isle of Wight, and part of Hampshire were settled by Jutes.—*Ibid.*, *passim.*

[3] The breadth of sea was not great. Probably most of the invaders followed the route that had been the favourite one in their attempts on Britain for nearly two centuries, along the continental coast to the Strait of Dover and then across. The attack radiating north and south from this central point accounts for the Roman name "Saxon shore" applied to the British coast from the Wash to the Isle of Wight.

Of the immediate results of the contact between Britons and Teutons, perhaps the most notable was that the Britons were exterminated or quite completely displaced in parts of the east and south (though there is some evidence of many Britons surviving in the extreme south-east and of less extensive "pockets" of them left in other places), and that as the invasion extended west, larger and larger numbers remained alive and on their land.[1] The ground was not contested with the same desperation by the natives when they had much territory to withdraw to as when they found that territory growing dangerously limited. This is not to deny, however, a sturdy resistance at all times. On the other hand, the invasion spent its force in the east, where the first comers settled down and occupied the land. The remoter regions were taken up more slowly by smaller bands that represented later, straggling arrivals from the continent, or, as was often the case, colonies that left the older and more thickly settled places near the shore. Long contact had also tempered the race hatred that seems to have been bitter at first. The conquerors were learning that the Britons were useful, and the latter were coming to choose a life of greater or less servility rather than death. At the end of the conquest, then, England's appearance was far from uniform, and this broad distinction between east and west, not to mention minor ones, has to be constantly taken into account. But in east as well as west a considerable Celtic element was absorbed, and ethnologists see in the English of to-day evidences of pre-Celtic strains.

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[1] It may be useful here to point out some important methods of investigating early Anglo-Saxon history. The most obvious in the case of any period is, of course, to collect all the written records, public and private, organise them, study them critically, and draw conclusions. But, as has been before stated, written documents relating to the period in question are so scanty and unsatisfactory, that could they not be supplemented by something else we could hardly hope to reach trustworthy conclusions. Two other methods of research have produced encouraging results and do not seem exhausted. The first is the study of the land itself, the physical geography and general topography of England. In the matter of the Anglo-Saxon conquest, much has been learned by the study of rivers and mountains, the location of old forests and marshes. It can be learned in this way what routes the various bands of invaders must have taken, where their way was barred, and where the enemy was able to make a stand. Many obscure passages in the scanty records have thus been explained. This study also gives hints of the manner of life after the conquest, which is the vital question. Nothing fades so slowly as the impress made upon the appearance of a country by its early settlers—the way they grouped their houses, laid out their fields, and ploughed them. Traces of such things will outlast by hundreds of years the state of society which produced them. But no kind of evidence is more likely to remain unappreciated, or is harder to handle judiciously. The second method of research is that of working backward from a period about which consider-

A typical settlement in the east of England in the early Anglo-Saxon period would consist of a group of families, most of them connected by blood, living together in a quite compact village. Each of the houses had its separate garden plot. Lying back of the houses, on all sides of the village, was the arable land, in which each freeman had his portion. This portion, however, did not lie all in one place, but consisted of small oblong strips scattered

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able is known to the period before about which little is known. If we get a cross-sectional view of institutions during long enough time to note their directions, relations, and the forces acting on them, much may be inferred of the roads they have been travelling back in the shadowy region behind. Taken by itself, this method carries but short distances, but when it can be checked by even a little evidence of a different sort, its value becomes great and the results illuminating beyond expectation. Green's *Making of England* contains instances (not all of them to be trusted) of the first of these modes of study, while Maitland's *Domesday Book and Beyond* is the classic example of the second. Studies in anthropology also throw light on race mixtures and survivals, and such studies have of late indicated a greater continuance of pre-Teutonic peoples in Britain than had previously been supposed.

about in different parts of the arable fields. This strange scattering of the individual holdings may have arisen from extreme care to have all the holdings equal in value: the quality of the land varying from field to field, it was proposed that each member of the settlement should have some of every kind. It also may have been caused, or at any rate continued, by pressure from above in cases where lords had much control of the land and wished for their own purposes to prevent the extreme inequalities and confusion which would arise from equal division of lands among children. The parcels of land being small were necessarily oblong on account of the needs of ploughing, it being economy of time and labour to turn the awkward eight-ox team as seldom as possible. Outside the arable land, lay meadow, pasture, woodland, and waste, in which all the householders had their prescribed rights. The estates of individual villagers were in no way marked off into separate holdings. Because many individuals did not have a complete outfit of agricultural implements or oxen enough it was the custom of the villagers to cultivate their land by some system of mutual help. Such settlements as these were, doubtless, a reproduction on British soil of something very similar which the Anglo-Saxons had known in their ancient home. Some slaves there may have been in all of them, furnished from the Britons or as the result of strife among the invaders themselves; but in these eastern settlements, the number must always have been small.[1] From very early times we hear of lords and rents, and there is little doubt that the fighters and the churchmen were largely supported by payments in labour and kind and that much of this must have been rendered by freemen.

In the west, the typical settlement was quite different and may have been influenced by previous Celtic arrangements, into which the conquerors fitted themselves, as was so generally done by the Germanic conquerors of Gaul. Instead of compact villages, there were elongated villages, scattered hamlets, or isolated farmsteads, and the number of slaves was large.[1] While the more complete driving out of the Celts in the east probably helps to account for this difference in type of settlement between east and west, yet there is much that is not at present explainable; and there are striking exceptions: in Essex, for example, the western type was the more common.

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[1] For a visualising of such a village community, see "Plan of a Medieval Manor," in Shepherd, *Historical Atlas*, p. 104, and map 15b in Putzger, *Historischer Schul-Atlas.*

Between these two types of settlement, there were doubtless many variations. There may also have been places where the Roman villa, that great estate, owned by one lord and worked by slaves and *coloni*, was taken possession of by the conqueror, who now became the lord, and, as far as he was able, continued this Roman agrarian unit without change. Evidence of any survival of the villa system is not positive; and, as it could never have been widespread in Britain, the extent to which it survived the Roman evacuation, was continued by the Britons, and finally adopted by the Anglo-Saxons, must have been very slight. But though not traceable to Rome, these Anglo-Saxon settlements appear to have had an element of aristocracy, of landlordism, in them from the start, and this element strengthened as time passed. So from earliest times there are traces of rights and claims which seem to us individual and those which seem communal. It was no one's thought to make a doctrinaire separation between these. "Both principles were combined according to the lie of the land, the density of population, the necessities of defence, the utility of co-operation."[2]

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[1] See the charts, illustrating the two types of settlement and their persistence to the present time, in Maitland, *Domesday Book and Beyond*, between pp. 16 and 17.

[2] Vinogradoff in *Cambridge Medieval History*, ii., 637. The dilemma to which historians formerly felt themselves bound, of tracing the development from communalism to individualism or else from individualism to communalism, is vanishing with increasing knowledge; and we are now face to face, as Maitland especially has shown, with the problem of tracing progress from the vague to the definite.

Not only was there lack of uniformity in the first Anglo-Saxon settlements in Britain, but in the years following there was constant opportunity for innovation. Colonies were being formed in the newer districts, and men were adopting that mode of life which seemed to suit best the particular time and place, there was little accumulated property, things were in no sense stable, and wars, famines, or pestilences easily broke up existing conditions and gave rise to new ones. "Agrarian history becomes more catastrophic as we trace it backwards,"[1] and surely early Anglo-Saxon society and institutions were extremely subject to change. Although, taking the country as a whole, the number of Celts that survived was large, yet, owing to their subordinate condition, they contributed little in language or institutions to the period that followed.[2] Thus as little that was Roman outlasted the period of Roman occupation, so little that was either Roman or Celtic survived the centuries of Anglo-Saxon conquest and colonisation. The slowness of the invasion and the resulting bitterness of the conflict[3] prevented the adoption by the conquerors of the manners and customs of the conquered, while it gave every chance for change and innovation in the conquerors' own institutions.

2. **The Local Government.**[4]—*a. The Classes of Men.*—Perhaps there is no subject in early English history in which one's modern notions are so likely to lead him astray as in this matter of the classes of men. We have here one of the best examples of the general distinction between the clear-cut ideas of modern times and the vague ideas of the past.[5] This is especially the case in dealing with the

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[1] Maitland, *Domesday Book and Beyond*, p. 365.

[2] Seebohm (*Tribal Custom in Wales*) believes that tribal custom, both Celtic and Anglo-Saxon, contributed to the manorial idea; that the tribal "chief," for example, had in him things which suggest and things which actually helped to bring forth the later lord of the manor.

[3] Continental history at this time teaches that sudden and overwhelming invasion often resulted in little bloodshed or displacement of existing populations.

[4] In this subject, the author is under constant obligation to the work of Maitland, especially the *Domesday Book and Beyond*.

[5] See above, p. 3.

difference between the freeman and the slave. Slavery and freedom in modern times are usually so sharply separated that a possibility of confusing them seems absurd. But in Anglo-Saxon times, conditions were very different. To be sure, many were slaves because born so, but the class was constantly being recruited in other ways: foes taken in battle, men in every way the equals of the conquerors, and of Teutonic as well as Celtic blood, became slaves; members of a community who may have long lived respected by their neighbours might, owing to a variety of misfortunes, be obliged to bow their heads in the evil time and part more or less completely with their freedom. It was impossible with their loose ways of thinking to allow the legal status of a man to be wholly uninfluenced by his personality. "We may well doubt whether this principle—'The slave is a thing, not a person'—can be fully understood by a grossly barbarous age. It implies the idea of a person, and in the world of sense we find not persons, but men."[1] With this caution in mind, the Anglo-Saxon population may be divided as follows: at the bottom of society were the slaves or serfs, men lacking freedom, but not necessarily lacking all rights; next in order came the non-noble freemen, the *ceorls;* and above them the *eorls* or warriors, the main body of whom was perhaps not much above the grade of the later gentry, while the *athelings* or princely kindreds were a true nobility. The status of this whole last class was based on blood and not on office or service. But from the earliest times are found traces of a nobility by service, and, with the development of the kingdoms, the eorls declined and the new nobility, the *thegns*, gained in importance. This word originally denoted service, and the early thegns, first mentioned in the late seventh and early eighth centuries, were king's followers. After the eighth century they became a landed aristocracy of about the grade of the later country gentlemen, though some notion of their belonging to the king's household long clung to them.[1]

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[1] Maitland, *Domesday Book and Beyond*, p. 27.

b. The Hundred and Shire and their Courts.—The names and sizes of the territorial divisions next larger than the township[2] varied greatly in early Anglo-Saxon times. There were *wapentakes* in the north, *lathes* and *rapes* in Kent and Sussex, *shires* in Wessex and Cornwall, and *hundreds* in many parts of southern and central England, especially Wessex. Generally, the southern divisions were smaller than the northern, as would naturally be the case owing to the greater density of population in the south. In Wessex, from the early tenth century, the hundred became the normal unit, and there local organisation gained some efficiency earlier than elsewhere. A tradition ascribes to Alfred the division of England into hundreds. When the Danelaw was gradually won back by Alfred's son and grandson, and all southern and central England were feeling the unifying influence of the strong West-Saxon kings, many things were made over new, especially in the reign of Athelstan, and it is quite probable that a more complete local organisation and the use of the term hundred thus started and spread outward from Mercia and Wessex. *Wapentake*, however, still remained the name used for the corresponding division in the north. The hundred was the smallest governmental division of Anglo-Saxon times, and serving chiefly a judicial purpose, is often spoken of as the judicial unit.[3]

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[1] Chadwick, *Studies on Anglo-Saxon Institutions*, furnishes detailed discussions of the early official classes. See the same author's *The Origin of the English Nation*, pp. 296, 297, for a theory as to why there were no freedmen among the Anglo-Saxons. See also Larson, *The King's Household*, especially pp. 76–88.

[2] Township is perhaps the most accurate and convenient term to apply to the individual settlement or village. The township, while usually having some economic unity, was not a political division. The villagers may have had meetings for the regulation of their common economic interests. Some scholars believe that a petty court existed in the early township, thus making the township a political unit, but there is no proof of this.

[3] The name hundred was possibly not native to Wessex itself, and may have been borrowed from the continent, taking the place of an earlier and varied terminology. Chadwick, *Studies on Anglo-Saxon Institutions*, pp. 239–248, and Liebermann in *Deutsche Literaturzeitung*, 1905, p. 12, sug-

The origin of the shire, the territorial division next larger than the hundred, is better understood. Some shires, as Kent and Sussex, are coterminous with the ancient kingdoms bearing those names. These kingdoms, when they passed under West Saxon control, gradually became local divisions of a united England and were classed as shires, a name which, unlike its earlier use, was being applied to large instead of small divisions.[1] Other shires, as Dorset and Somerset in Wessex, and Norfolk and Suffolk in East Anglia, stand for early tribal divisions. Thus these two classes of shires perpetuate boundaries as ancient as the Anglo-Saxon conquest. In the midland districts, the shires are much less ancient and of quite different origin. When Edward the Elder and Athelstan won back these districts from the Danes, they divided them into shires for military and administrative purposes and, in doing so, probably took little account of ancient boundaries. Here the shire and its principal town have often the same name, the town lying near the shire's

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gest that both name and organisation came from Scandinavia. For further information on the early English hundred and, especially, its relation to the continental hundred, see Stubbs, *Constitutional History of England*, § 45, and *Select Charters*, pp. 78–80. The source material following the latter reference could be studied here with much profit. "All Teutonic countries know a unit, which, under the name of *hundert, hærath, hundred, huntari*, comprises a number of villages, and is, at the time when Teutonic history begins, the primary judicial unit. The etymology of the name points irresistibly to the conclusion that it was also, at one time, a military unit. But this is not to say that it had not an older character, and, it may be, an older name. Dr. Meitzen has shown strong reasons for supposing that it is a relic of the pre-agricultural stage, in which the members of a clan fed their flocks and pitched their tents on a patch of territory which afterwards, as agriculture developed, became divided into villages . . . the extraordinary differences in the sizes and contents of the hundreds seem to show that they could hardly have been, in origin, military institutions. . . . A police institution they do, undoubtedly, become; but this is later."—Jenks, *Law and Politics in the Middle Ages*, pp. 164, 165. In England the number of hundreds in a shire and the size of hundreds vary greatly. For example, there are 5 in Leicestershire, 9 in Bedfordshire, 17 in Cambridgeshire, 63 in Kent. In early times the number of villages in a hundred varied all the way from 2 or 3 to perhaps 20.

[1] Many ancient local names that contain the word shire indicate that in the earliest times it was often used for very small divisions, but with little definiteness of meaning.

centre. This probably indicates that the towns are older than the shires, the former having been used as fortresses by the West Saxon kings or perhaps created for that purpose. Worcester, Northampton, and Bedford are examples of this group. The northern shires, representing pieces of the ancient Northumberland and Strathclyde, have, for the most part, originated since the Norman Conquest.[1] It was undoubtedly the unifying and organising activities of the West Saxon kings in the ninth and tenth centuries that did much to change the earlier territorial confusion into the two grades of local division with the name hundred applied to the smaller and shire to the larger.

In both hundred and shire, popular assemblies were regularly held. That of the hundred, the hundred court, as it is usually called, had to do with judicial matters only. From the tenth century, it met normally every four weeks.[2] It was competent to deal with cases of all sorts, and a case once decided in it could not be carried to a higher court. In fact there was no such thing as appeal, in the modern technical sense, in the Anglo-Saxon judicial system. The hundred court, however, might, and often did, refuse to entertain a case[3] or fail to reach a decision in one. Such cases might then be taken to the shire court, and, if not decided there, to the king; and occasionally cases were carried directly from the hundred to the king.[4] But taking cases to the king was discouraged. In early times the hundred court was convened by a hundred-man or hundred's-ealdor, but after there were sheriffs this official was replaced by a serjeant or bailiff of the sheriff, appointed for each hundred, who convened and presided. Probably most of the free landholders of the hundred attended either in person or by deputy, and this body of freemen did the judging, as far as any real judgment entered into their procedure. There was nothing in the nature of a professional body of judges or lawyers in England until long after the Norman Conquest.

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[1] See Stubbs, *Constitutional History of England*, § 48.

[2] There seems no doubt that there were local popular courts in districts including a number of townships long before there was any regular division of the country into hundreds and shires. The use of a small territorial division for police purposes, perhaps its creation to that end, appears to have been one of the very earliest of governmental efforts among Germanic peoples.

[3] Perhaps because of its importance; but more often it was because of some malice or disability under which the party to the suit was labouring, or the unrighteous use of power on the part of a local lord.

[4] See Stubbs, *Select Charters*, pp. 83, 86. "The suitor who comes before the king comes not to get a mistake corrected but to lodge a complaint against his judges; they have wilfully denied him justice." Maitland, *C. H. E.*, p. 106.

The shire court was summoned twice a year by the sheriff, and he, together with the *ealdorman* and bishop, was present at the sessions. The ealdorman, originally having an official character, was, towards the end of the tenth century, fast becoming the independent local noble with control over vast territories, and his attendance at shire courts must have been increasingly irregular. Whether he or the sheriff was the presiding or constituting officer of the court, it is impossible to tell. The bishop was there to declare the law of the church and look after the interests of the clergy, for the court dealt with both ecclesiastical cases and persons. All men of importance in the shire seem to have attended as a matter of course; but it is hard to make an accurate statement about the others who came. It is conjectured that in very early times this was a thoroughly popular assembly, and, in those shires which perpetuated the boundaries of early tribes or petty kingdoms, may have been a lineal descendant of a tribal assembly attended by the armed body of freemen. But it had become burdensome to attend the now regularly summoned and peaceful shire court. Travelling even a short distance was a difficult matter in those days, and the time consumed by the sessions and the journey seriously interrupted the rural economy. At the time we get our first certain knowledge of the make-up of the court, there was no complete attendance of the freemen, and, very possibly, the process by which, after the Norman Conquest, the burden of attending court (*suit of court*) became attached to certain holdings of land rather than enforcible against all freemen had begun.[1] But, notwithstanding this, it may be said of the shire court, as of the hundred court, that it was, and always remained, an essentially popular assembly.

In these courts, a body of unwritten customary law was being administered by the people from whom it had sprung, and in whose hands it was undergoing a natural development. It was, however, a primitive law, dealing largely with criminal matters, but with no conscious distinction between what was criminal and what was civil. Deeds of violence were common, especially manslaughter, wounding, and cattle-stealing. The Anglo-Saxon period strikingly illustrates the transition from the early state of society, in which men right their own wrongs, to the time when something which may roughly be called the state steps in between the wrongdoer and the wronged and does the righting. The individual or the kin still had much to do with it, but there were public courts which prescribed just how it should be done and took a large share in the procedure.[2]

Apart from procedure in the actual presence of a court of law, there were the ever recurring problems of the pursuit and capture of a fleeing criminal, the forcing of anyone resting under any kind of charge or summons to present himself before the court, and, when cases ended with fines imposed, as so many did, the ensuring of the fine's discharge. The co-operation among neighbours, townships, and later, larger units, to track down and seize the fleeing wrongdoer must have been among the first efforts of society to protect itself. This was the institution later called the *hue and cry*, and it may have been called that or something very similar by the Anglo-Saxons. When the cry was raised by someone who had suffered violence or who saw evidence of a crime committed, as in finding a dead body, the neighbours must join in pursuit wherever the track seemed to lead, and if it led into another township that township was expected to help. Evidence of this institution appears first in the written laws under Athelstan, and then much more clearly in Edgar's Ordinance of the Hundred, where the co-operation of even such large units as the hundreds was commanded. Though it here emerges in written law, and the Ordinance contained an important regulation of the custom, there are indications of its much greater antiquity, especially on the continent. The element of suretyship, the holding of a man to his appearance in court, his discharging a fine or other obligation, was something that in early times rested with the kin. But when kin were few or wholly lacking, there was an effort to place the obligation elsewhere, perhaps sometimes upon a man's companions in arms; later, after Christianity through its condemnation of feuds and its insistence on individual responsibility had weakened the tie of kin, the hundred was occasionally held responsible; more often, after commendation was frequent, a man's lord.[1] But some notion of kin responsibility remained long and perhaps usefully in the realm of police functions.

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[1] It was a tendency characteristic of the middle ages to territorialise public duties. To exact such duties of large bodies of men by dealing with them personally overtaxed the slight executive powers of the time. A piece of land was a stable thing, always to be found, and could stand for a fixed amount of public service to be enforced against its holder or holders, without reference to changing numbers or personnel. The attempts in the later Anglo-Saxon period to bring under lords all freemen who lacked substantial landed property, the lords representing them in the courts, favoured the territorialising of suit of court. Freeholding rather than personal freedom was becoming the measure of some at least of the political burdens. See below, p. 38, note 1.

[2] For a valuable account of this procedure, see P. and M. ii., 598–603; also Maitland and Montague, *Sketch of English Legal History*, ch. i.

The summoning of the defendant to court was done, not by an officer, but by the plaintiff himself, who had to be very careful, however, to do it in the prescribed manner and at a certain length of time before the meeting of the court. The summons was often ineffective, and the courts had a great deal of trouble in making their authority felt, especially in getting criminals before them. The imposition of fines (usually in cattle and in this connection constituting a kind of regulated *distress* upon the man or those held responsible for him), which was the principal means of compulsion, would, in many cases, amount to little, and, as a last resort, the man who could be dealt with in no other way was outlawed: that is, he was put outside the protection of the law, so that he might be killed at sight like a wild beast. Indeed the courts were not so much thought of as compelling people to come to them or abide by their decrees, but as places to which parties could voluntarily resort, having a kind of gentlemen's agreement to abide by the result. But supposing both parties to the suit to be in court, the next step was the taking of the fore-oath by the plaintiff. In this, he stated his case according to a set form of words, and often brought to swear with him a *suit of witnesses*—one or more men who were ready in a preliminary way to support his oath and thus establish a *prima facie* case. The fore-oath was usually required except in case of manifest fact, like a fresh wound. The fore-oath was followed by the equally formal oath in rebuttal by the defendant. But it might happen that he could not take it; the oath was a solemn matter, and, if guilty, he might hesitate to stand before his assembled neighbours and make the assertion which carried with it a damning guilt.[1] On the other hand, plaintiff or defendant might trip in repeating their formulæ, and any mistake, at this or any other point in the procedure, was fatal to the cause of the one making it. But if the defendant took his oath successfully, the case might end at that point, and in his favour. Thus the solemnity of the oaths, the fact that the court consisted of the neighbours of the parties whose affairs they knew, and that the suit of witnesses often had especial knowledge of the case would bring to an end many of the less difficult points of dispute. But in the more baffling cases it was now for the court to decide which party should make proof, what the proof should be, and what should be the result of success or failure in the proof. This was the real judgment in such cases, and was the point at which the assembly, that is, the judging body, could make itself felt in a rational way. The proof was usually awarded to the defendant, and this action, considering the character of the proof oftenest used, was, doubtless, somewhat in his favour; but there might be considerations that would lead to the opposite action. The judgment, then, instead of coming where we should naturally look for it, came in the middle of the procedure and before the proof, which, in a distant way, corresponds to the modern trial. This seems less strange when the nature of the proofs is understood.

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[1] On the later history of suretyship, see below, pp. 67-69 and 109, 110.

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[1] In connection with the importance of the oath throughout procedure, it should be noted that at this time there was a greater gap between mere lying and breaking an oath than now. Their great regard for oaths was probably indicative, among other things, of their generally light regard for the truth.

When once set in motion, the proofs took care of themselves, so to speak; they needed no attention on the part of the court except to see that they were carried out according to the letter of the accustomed form. They were of two classes, oaths and ordeals. In the first class, were the oaths of the oath-helpers, later called compurgators, and the oaths of witnesses in those civil suits in which the ownership of property was in question. Compurgation was the commonest proof in what would now be considered both criminal and civil cases. The man of unstained reputation, unless he were under a specially serious charge, would usually be given this proof. The oath-helpers took their oaths, not because they knew the facts of the case, but because they were willing to imperil their souls to the extent of swearing with the man whose oath they were to strengthen. In early times, the oath-helpers were usually required from the party's kindred, a further illustration of the irrationality of the system. Later, this custom passed away, and the idea came in that most of the oath-helpers should belong to the same general class in society as he with whom they swore. The value of their united oaths was measured according to their number and rank, a thegn's oath equalling those of six ceorls. Thus the gravity of the crime was reflected in the number and quality of the oath-helpers, as a result of which it would, of course, happen that a man of low rank must have a larger number for the same crime than a man of high rank. A successful oath-helping does not seem to have been considered so much a proving that the accused was innocent (though it may have been that to some extent), as something of a vicarious compensation; there had been an atonement for the crime through the perilling of the souls of a number of men.[1] Probably a more rational way of regarding this proof existed in later Anglo-Saxon times; indeed, the changes just noted indicate this.[2] Proof by the oaths of witnesses became common through the practice of having witnesses present when exchanges of property were made.[3] If a man was engaged in a transaction that he wanted witnessed, he must call upon the bystanders at the time. If he did not he could not afterwards compel them to come to court to testify. The production of witnesses could not be on the basis of an afterthought. Such transactions had oftenest to do with cattle, and the presence of witnesses became increasingly imperative during the Anglo-Saxon period. Royal decrees upon this matter were frequent and urgent, showing, if other evidence were not abundant, how great a problem cattle-stealing was in these primitive communities. If a man's ownership of certain cattle was called in question and he was not able to bring forward any witness of his purchase, it was practically an acknowledgment of theft. Probably a man would also be allowed to show by oaths of neighbours that cattle had been raised by him; but disputes about such cattle would seldom arise. At first sight, these practices seem very much like our modern witness system, but there is an important difference. These ancient witnesses were not put on oath to answer in court any questions that might be put to them in order to bring out the whole truth about the matter under litigation. Only one party to the suit produced them and they knew beforehand the set formula to which they must swear. There was no elasticity, no equity; it was simply the question whether they could take the one oath which was to be the defendant's proof.

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[1] Speaking of the early time when kinsmen were oath-helpers, Maitland says: "The plaintiff, if he thought that there had been perjury, would have the satisfaction of knowing that some twelve of his enemies were devoted to divine vengeance."—P. and M. ii., 600.

[2] There were two kinds of compurgation of differing severity, one requiring verbal accuracy, *in verborum observanciis*, and one not.

[3] For instances, see Stubbs, *Select Charters*, pp. 74, 75, 84.

The second kind of proof, the ordeal, might, if the court so judged, be resorted to after the fore-oath and oath in rebuttal, or it might follow a more or less unsuccessful oath-helping. In the criminal cases other than cattle-stealing, there was no attempt to use witnesses, compurgation and ordeal being the only proofs. The ordeal was used mainly in connection with the more serious wrongdoing and was a deliberate appeal to supernatural knowledge (originally to the gods of fire and water) by men who felt themselves powerless to penetrate the mysteries of crime. The ordeals of hot and cold water and hot iron were common, and the ordeal of the accursed morsel was also used. The wager of battle, which was, properly speaking, an ordeal, was not used by the Anglo-Saxons. The ordeals, with their pain and risk, often caused those to whom they had been awarded to hesitate, and there were many last-moment compromises. A good many primitive forms of justice performed their most useful function in bringing about extra-judicial agreement.[1]

In a procedure dealing largely with criminal matters, we naturally look for punishments to follow the proofs, but there was little punishment of the sort that might be expected. There were no prisons, and capital punishment was rare. If we think of Anglo-Saxon courts as helpless before the mysteries of "fact," they were also helpless in adapting the punishment to the crime[2] or in

[1] For a full discussion of the primitive methods of trial, see H. C. Lea, *Superstition and Force: essays on the wager of law, the wager of battle, the ordeal, and the torture.*

As to why the wager of battle was lacking in Anglo-Saxon law see P. and M. i., 50, 51.

[2] There was little classification of crimes. Secret slaying was much more severely treated than open slaying. This was not wholly the root of our

assessing damages in civil wrongs. Nearly every kind of wrong was righted by a fine, in origin a commutation of the old blood feud into money payment that antedates Christianity and was probably worked out very slowly in primitive Germanic history. The fines had by this time become so elaborated and definitely fixed by custom, that, in imposing them, the court used little, if any, discretionary power. If a free man was slain, the slayer had to pay a fine, called the *wer*, to the dead man's kin, the amount of the *wer* being determined by the victim's rank in society.[1] A fine which was a compensation for any other wrong was paid to the injured party, and was called the *bot*. Probably, in its broadest sense, the *bot* included the *wer*, the fundamental idea being that it was a private compensation proportioned to the injury done. The *bot* was not a penalty. But in the case of most crimes, a fine, called *wite*, was also paid to the state, this fine being of a penal character.[2] In the shire court, part of this latter went to the ealdorman, part to the king, and perhaps something also to the sheriff. Under the later and stronger kings, as the sphere of the royal peace extended, the size and number of the fines going directly to the king were growing rapidly, and there was perhaps approaching, however distantly, the idea that a crime is an offence

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malice aforethought, but was mixed up with primitive horror of witchcraft, or of poisoning as probably connected with witchcraft; it was not avoidable, not a fair fight. The tariff of fines went into great minutiæ with respect to every kind of wound or mutilation.

[1] There was probably a relation between *wer* and landholding. The unfree did not have a perfect kin to swear for them in oath-helping or be responsible for their *wer*. A man could not attain to a full *wer* till he held land and could point to a number of generations of landholding kin back of him. The *wer* was paid in cattle, and those only possessed cattle who had the tribal rights in land. The *wer* of the ordinary freeman was usually one hundred head of cattle, reckoned as two hundred gold shillings. These were the "two-hundred men" spoken of so often in Anglo-Saxon law. The thegns were the typical "twelve-hundred men." The higher nobles, prelates and princes, had much higher *wers*.

[2] A fine of this sort indicates a more mature society than the compensatory *bot*. But the *wite* was ancient and had undergone change. It may have been at first a fee to the court, later appropriated by the king; or it may have been compensation for a real or supposed violation of the king's protection, later extended in a routine way to all cases.

against the state. A man who could not pay his fine and to whom the help of kin was lacking might be reduced to slavery, and in the case of offences by slaves there were traces of the old system of private vengeance or corporal punishments which the fine system had mitigated. Some offences, often those against the king, no one could make good by a fine. Such were known as *botless*, and in the later Anglo-Saxon period constituted the primitive pleas of the crown.

The last step in the proceedings in most cases was the collection of the *bot* by the victorious party. This, like the beginning of the case, was not attended to by an officer, but by the man concerned. Here again, however, the act had to be done at a certain time and in a certain way, which had become fixed by custom. Public authority backed up the individual if he met resistance in his lawful undertaking, even the king sometimes riding forth with his followers to aid in coercing some notoriously contumacious wrong-doer. But, on the other hand, if the man collecting the fine departed in the least from the prescribed programme, he lost the benefits of his successful suit.

Anything that can be called a law of property among the Anglo-Saxons was rudimentary and mixed up with precautions against theft and charges of theft. There was scarcely any law of contract; "business had hardly got beyond delivery against ready money between parties both present." About the only transactions involving future settlement were marriage and payment of *wer* and some of the heavier fines. Here there was much of oath and pledging. As to such trading disputes as there may have been, the general law and courts seem to have taken no account beyond the use of transaction witnesses already noticed. There may have been town and market courts for such purposes. Land law seems very meager and vague. There was little buying and selling of land—probably when it was sold the consent of the whole village must be gained. In the case of ordinary free landholders, there is no proof that they could will their land. With *bookland*,[1] which signified fully as much a kind of right over the people on the land as of proprietorship in the land, all was different; the holder could often sell, lease, or will. But *bookland* was in its early stages when the Norman Conquest interrupted. Rules of land inheritance varied, and there are instances of almost every kind; but equal division among sons was commonest.[2] While it may be said that these Anglo-Saxons enjoyed the freedom of living under a law which they themselves had made—whether we are thinking of the scanty rules of substantive law or their more elaborate law of court procedure—a law that had not been imposed upon them by any despotic central power, yet the rigid formalism which they had developed was in itself a tyranny and often defeated the ends of real justice. They were very ready to accept something better when, after the Norman Conquest, the king opened his own court to them.[3]

In concluding the account of hundred and shire organisation, something further must be said of the shire's two most prominent officials, the ealdorman and the sheriff. The ealdorman was theoretically an appointee of the king; he had a distinctly official character, and might be placed over a single shire or several shires, the latter being usually the case. He was the shire's chief man, commanding its military force and having the position in its court already described. But when ealdormen are first heard of, they were making successful attempts to render their positions hereditary, and were identifying themselves with the interests of their localities rather than with those of the king. As the king's dominion approximated all England under Alfred's descendants, the ealdormen coveted corresponding extension of territory. They sought more and more shires and hence could not attend well to shire business and the meetings of the shire court. In the late Anglo-Saxon period, they were becoming a great landed nobility, and in the eleventh century, now known as *earls*,[1] they practically destroyed the country's unity and prepared the way for the Norman Conquest.

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[1] See below, pp. 39–42.

[2] See Pollock, *Anglo-Saxon Law*, Select Essays in Anglo-American Legal History, i., 88 ff.

[3] For some documentary material on the early hundred and shire courts, see *Translations and Reprints* (English Constitutional Documents), pp. 20–22.

This change in the ealdorman undoubtedly accounts for the rapid development in the tenth century of a lower, single-shire official—the sheriff. We hear of divers kinds of reeves from early times, among them, king's reeves, who seem mainly to have had charge of the king's landed interests; but the use of shire-reeves, that is, sheriffs, by the king was not at all general until this time. The sheriff was appointed by the king, and had very limited grants of land. Although there appeared in the office of sheriff the same non-official tendencies that affected the ealdorman, and though he strove to enter into the ealdorman's dignity and power, yet, during the Anglo-Saxon period, these tendencies did not have an opportunity to develop far, and the sheriff remained substantially a royal official.[2] The maintenance of such officials was the first effective reaching out by the central government to touch and influence the local government. It was a hint, in Anglo-Saxon times, of the long process that did much to shape the government after the Norman Conquest. Ordinarily there was one sheriff for each shire; he convened the shire court, accounted for the king's share of the fines in the shire and hundred courts, assembled the militia at the king's command, and had general oversight of royal property in his shire. He was a link between the centre and the localities.

In estimating the extent to which the king was able to make himself felt locally in the later Anglo-Saxon period, mention must be made of the *king's peace*, one of the most important of Anglo-Saxon beginnings. Persons or things that were in any special way connected with the king were likely to be considered as falling within his peace. It was a serious matter to break the king's peace; deeds of violence against the king's officers or servants or committed in the king's house or on the king's highway were subject to a severer penalty than those against ordinary persons or in ordinary places. Thus there were two kinds of peace in the country: the king's peace which was limited in its scope, and the general peace of the local courts.[1] But taking into full account all the efforts of the Anglo-Saxon kings, through the sheriffs or otherwise, to extend their authority in the localities, still the lack of co-ordination between the central and local governments remained great, and the local government, such as it was, would probably have gone on without serious difficulty if the king had ceased to be. As kings grew strong and the country more united under the West Saxon dynasty, there was a broadening of the scope of the king's peace; it took in more territory and covered more persons. It was coming close to, if it had not already reached, its recognised second stage, in which it applied generally, but had to be claimed in proper form by the injured party in order that he might reap its benefits in court. It was left to Norman and Angevin kings to hasten it to its third stage in which the courts took it for granted.

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[1] Owing to Danish influence, the word *earl* (from the Danish *jarl*) was substituted for *ealdorman*. It should not be confused with the earlier Anglo-Saxon *eorl*, which was a general word for the man of noble birth.

[2] In a few cases the office of sheriff later became hereditary.

c. Origin and Early History of Boroughs.—In England, the urban community, the municipality, is called a borough, the term city being applied to those boroughs which have, or have had, a cathedral church. The beginning of boroughs was the beginning of a special form of government for the inhabitants of places so called, by which they were placed in an exceptional position, and were more or less cut off from the ordinary local organisation. Governmentally and economically they were little alien units springing up in the rural hundreds and shires. They must be taken into account in connection with Anglo-Saxon local government; and they become ever more important in governmental history. One is at once faced by the question of origins. What was the thing which made a place urban and the lack of which left it a village or township? At first, he is inclined to think of population as being the essential thing: when a community reaches a certain size, it should be declared a borough and receive the organisation and rights of one. But such a conscious process could only take place after a considerable number of boroughs existed and people knew what was meant by one. What was the origin of the first boroughs?

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[1] It is probable that this second form of peace was never thus consciously taken account of at the time, whereas the king's peace was matter of frequent mention. Indeed the whole question of the older peace is a vexed one. Was it recognised and backed up by the king? And what is the relation of all this to, or its evolution out of, the old private vengeance idea?

During the Roman period, there were cities in Britain, as elsewhere in the Roman empire; and these cities suffered the same devastations from the incoming barbarians as the other cities of the empire north of the Alps. Much that was material survived and, in several places, there was undoubtedly a continuous population; but it is improbable that the government of these cities lasted through the century and a half of Anglo-Saxon invasion and conquest. English municipal institutions had their origin in the Anglo-Saxon period.

When the first English boroughs emerge from the darkness of the past, the things that distinguish them from the ordinary townships are few. But it is clear that a differentiation had begun: certain communities had started to travel a different road from that of the majority; and, though the divergence was at first small, we know that many of these humble boroughs at length became true municipalities, and, on the way, set the example to other communities that sought to adopt their forms and attain their privileges. But the trouble is to account for the first distinguishing traits of the borough. Probably these did not spring from the same causes in all cases, and, at present, it is not possible to distinguish between and fully explain these causes. But the origin of an important group of midland boroughs is known with some certainty.

When Edward the Elder and his descendants were winning back the territory that Alfred had ceded to the Danes, they established many fortresses in order that their hold upon the country might be secure.[1] In doing this, they might choose an uninhabited spot, or they might fortify a village or build a fortress near one. Such fortresses were known as *burhs*, of which *borough* is a later form. The *burhs* were, in a special sense, the king's; they were often thought of as his places of residence and his peace reigned in them. Every Englishman's house was his castle, and it was thought a grievous offence against him to break its peace; but to make a breach of the peace in the king's *burh*, to make *burhbryce*, was far more serious. So a specially stringent peace, enforced by severe penalties, reigned there. Fighters must be present in these *burhs*, and the burden of maintaining them fell upon the great men of the respective shires. Where rural communities had become fortified places, there was beginning a mixed population. A well-protected place, and one where a special peace reigned was attractive to those whose calling required security: artisans and traders were drawn, and, if the *burh* were favourably situated, a market might come to be held in it. Thus a new element of population was added. Often the shire court was held in what we may now venture to call the borough, and increased its importance. But the boroughs more and more needed courts of their own, and seem to have had them quite generally by the late tenth century. Such courts were co-ordinate with the hundred courts and so took the boroughs out of the hundredal jurisdiction. In Edgar's laws, along with the decree that the hundred court be held every four weeks and the shire court twice a year, there was that ordering the borough court three times a year. Thus the differentiation was well started, and yet there was no borough government apart from the court, which was, no doubt, conducted much as was the hundred court.[1] And there was no greater unity, nothing looking more towards modern municipal corporateness, than in any of the rural villages. All the elements that had gone to form this primitive borough, the old arable fields of the original settlers, with the pasture and waste surrounding, and the rural traditions and customs which these implied, the houses owned by the great men of the shire, the descendants perhaps of those who kept the early garrison, the people who looked to these men as their lords, and, finally, the later industrial group, that was tending to assimilate the rest—all these remained clearly discernible, and traces of them lingered for a long while. But what these midland boroughs had was a distinctive name, a court that enforced a strict peace, a position of importance in the shire, a somewhat shifting and mixed population, and a beginning of industrial and commercial activity. Yet by no means all the fortresses built to hold the midlands were nuclei of boroughs.

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[1] See above, pp. 14, 15. Alfred himself probably began the fortress policy, but it was extended rapidly into the midlands after his death.

After the idea of a borough had taken shape, there was always the possibility of its being more or less consciously adopted by centres of population where no king's *burh* had been. But it cannot be stated that all the boroughs of later times either began as king's *burhs* or received their distinguishing governmental forms from places that had so started. And it is not certain that the midland fortress boroughs were the first places to differentiate from the rural communities, though they seem to have furnished a name that, by some means, became identified with such differentiation. The fortified residences of great nobles, monasteries, seaports, or any places well located for the establishment of markets were centres about which people might gather; and, to meet the judicial needs of such centres, especially where trading was carried on, it seems likely that special courts might grow and the institutional distinction from the ordinary townships be established. Populations which gathered about the residences of lay or ecclesiastical lords were drawn by the industrial needs of such establishments. Such needs were varied. The labourers and craftsmen who met them came often from the servile or semi-servile classes, and the rude towns which they made were regarded as belonging to the lords. Such industrial groups might also form upon the king's extensive lands, and, if they developed or acquired the borough qualities, add to the number of boroughs that he already had. At any point in the later Anglo-Saxon period, there can be found a group of boroughs clearly recognised as such, the old boroughs. These may have originated in any of the ways mentioned. There can also be found communities in all stages of progress towards boroughs, and, in the case of some of them, it is impossible to conclude whether or not they may be properly considered boroughs. This was still the case at the Norman Conquest. And by that time, forces which had been increasing the powers of the great landholders and depressing the status of the middle-class freemen were more and more bringing all boroughs under lords, who enjoyed financial and judicial privileges in them.

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[1] It has been conjectured (Chadwick, *Studies on Anglo-Saxon Institutions*) that the court which met thrice yearly was made up of county landowners who had houses in the borough, and that there must have been more frequent meetings of the burgesses themselves.

The tenure by which real estate was held in the boroughs was known as *burgage* and was based upon a money rent. It was a heritable tenure and much like *free socage*, which latter was the most important of a group of Anglo-Saxon free, non-noble tenures.[1] Burgage has been described as a sort of town socage. How a tenure purely at a money rent arose at such an early time is an interesting but obscure matter. Probably it was originally a commutation of some earlier and more uncertain service.[2]

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[1] The idea at the "root of the term socage is that of seeking or following; the socagers, *sokemanni*, are bound to seek, follow, attend the court of the lord." Maitland, *C. H. E.*, p. 48. See below, p. 44 and note 1, and also on land tenure after the Conquest, pp. 94–96, 101.

[2] Maitland, *Domesday Book and Beyond*, pp. 198–200.

Uncertain service was the characteristic of unfree tenure, and when this was commuted into burgage tenure by the lord of a semi-servile industrial group, it went far towards marking off that group from an ordinary manor, and started it towards the organisation and privileges of the older boroughs.

As the boroughs grew in wealth through industry and trade, it became possible for their lords to get a greater income from them; and, as the royal boroughs were the most numerous, the king profited most. The imposition of various tolls was always the accompaniment of a flourishing market upon any lord's domains. As the business of the borough courts increased, the fines received from them by the king, as from the shire courts, increased. Thus a substantial revenue was furnished the king from his boroughs, consisting of rents, tolls, and fines. These items, taken together, were known as the *firma burgi*, and formed part of the *ferm* of the shire for which the sheriff was held responsible.

The boroughs were not slow to recognise that they differed from the other communities, that they had special needs, and that, as population and wealth increased, so did their power to obtain privileges from their lords. To gain the right to pay the sheriff the *firma burgi* in the form of a fixed, lump sum, instead of running the chance of its increase and suffering the petty annoyance of having it dealt with in detail, was the first important step towards independence taken by the boroughs. To be able to deal with the sheriff solely at the gate became an ambition. But the story of the borough's strife for independence follows, rather than precedes, the Conquest. The facts to note here are that the boroughs had come to contain an important, middle-class population; that they had a form of government of their own, an increasing *esprit de corps*, and a knowledge of their own special needs.

d. Anglo-Saxon Feudalism.—With the consideration of the boroughs, there has been completed a brief survey of the Anglo-Saxon local government as it existed in the earliest times of which we have any important knowledge. But even while the boroughs were coming into existence, and, in its beginnings, probably antedating them, a profound change was taking place in Anglo-Saxon society and local government. It has been shown that, in their conquest and occupation of the country, the Anglo-Saxons produced different types of settlement: in the east, the compact villages; in the west, the elongated villages, scattered hamlets, and isolated farmsteads; also that in the west there were more slaves.[1] By the end of the Anglo-Saxon period, some improvement in the condition of the slaves had taken place, but many freemen were losing their rights in the land and were lapsing into a condition of more or less dependence upon great landholders. In the east, certainly, the land had gotten into the hands of fewer men, and manorial organisation was growing within the old townships. In a manor, one man, the lord, was getting a hold on the land which approached ownership; and lord and tenants formed an agrarian organisation in which the latter, some of them typically servile, worked co-operatively on the lord's demesne, and besides made payments in kind and money as rents for their landholdings as well as for protection and guidance. The lord also held a court which the men of the manor were bound to attend and in which they were tried.[2]

Economic and semi-governmental forces shared in the change which brought forth manors, forces which, at the start, are hard to distinguish and which tended constantly to coalesce. In many parts of western Europe, as well as in England, populations that had been wandering tribes were becoming stationary, denser, more civilised. As a result, a more efficient government and new economic arrangements were needed; but it would have required a long time to evolve a permanent central power that could meet the governmental need. In the meantime, it must be supplied by some power that could be developed more quickly, that is a local power. It occurs to one that there was already in England a system of local government, and that there was needed only a fuller development of this. However natural this may seem, it was not what took place, and a little reflection will show that no short process could have made assemblies constituted as were those of the hundred and shire efficient. The change was relatively swift, and it meant that the land and the power were to pass from the hands of the many into the hands of the few. This was substantially what has happened, under similar circumstances, in many parts of the world and at many different times. In a broad sense of the term, it was a *feudal* process; it was the acquisition of economic advantage and some degree of political power by private individuals.[1] Its results in England may be called Anglo-Saxon feudalism. But the process was far from complete at the end of the Anglo-Saxon period. The forces causing it were neither so great nor so sudden as they have, at times, been elsewhere, and the older local organisation had strength and tenacity. Hence local conditions in England, upon the eve of the Norman Conquest, are hard to understand. There was neither the old organisation and classification of men nor the new; society and institutions were in a fluid state, and although one can see in a way from what and to what they were tending, he must be content with hazy ideas as to just what they were.

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[1] See above, pp. 9–12.

[2] But after manors developed, the township idea and organisation were not wholly lost. The manor was an economic unit, and might or might not coincide territorially with the township. When the central government had dealings with the local units it was with the township, not the manor, as for example in police measures.

Of specific processes in this change *commendation* was prominent. It was the act by which one man entered into such a relation with another that the latter became his lord. It was a personal relation and for mutual benefit. The lord gave protection and guaranty, and was often called the *defensor* or *tutor* of his man. In return, he received the value of an armed retainer or some other more or less clearly defined service. The object of the man in getting a lord was to gain, by this private transaction, greater security in troublous times than was afforded by the crude local government, or it was to obtain some economic advantage through connection with a great landholder. Probably in most cases the man acted with a mixed motive. Simple as this relation of lord and man seems, it was capable of great variation: to become the men of some lords, under some circumstances, meant an actual rise in status; there was something honourable, almost ennobling, about the act; on the other hand, commendation often lowered the man's status, and, if it did not mean an immediate loss of freedom, it looked in that direction. There was no technical exactness, and the relation of lord and man might imply almost anything. But one generalisation can be made at this point: the class of non-noble freemen was becoming less homogeneous, it was splitting. The change was that sharper division into classes likely to result from a more settled life and a denser population. No one was at first concerned with furthering it; it took place naturally, for it solved a problem of the times.

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[1] Historians to-day do not think, as did earlier writers, that this great change can be summarized as a change from communalism to individualism or vice versa or a change from freedom to servility. It cannot be reduced to such a simple formula. One thing is sure: a primitive society of landholding families was becoming through quite natural causes a society of landlords and tenants. But this economic change was accompanied by much else.

One cannot fully understand any medieval relation between lord and man until he knows to what extent the tenure of land was involved, for a man's legal status was closely related to the character of his tenure and was often affected by it. Indeed at this time the possession of freehold land was coming to be the badge and guaranty of full free status, whereas in an earlier state of society free status ensured the possession of land. In Anglo-Saxon commendation, land was sometimes involved and sometimes not. The man might bring land to the lord and, in some sort, hold it under him, being able to withdraw the land at any time and "go with it" to another lord, and, in some cases, he might have no such power. Also the land might come from the lord and be granted to the man, in which instance the latter's liberty in disposing of it was probably less. There was less regularity in the matter than in continental feudalism, in which, as between lord and vassal, the greater right to the land lay with the lord, and everybody must hold his land *of* some one. In the Anglo-Saxon relation, the ownership of the land, as far as there was any conception of ownership, might lie with the man; men held land *under* their lords, that is, under their protection and guaranty, rather than *of* them. And yet, in the frequent lessening of the man's freedom to "go with the land" where he chose, we may see the lord gaining some right in the land, although what it was may be too vague to express.[1]

After commendation had become common, the kings took account of it for a purpose of their own, and this resulted in some extension of the practice and added something to its character. As has been shown, a great weakness in Anglo-Saxon local courts was their inability to make their authority felt; men were not easily gotten to court or held to the court's decrees. It was a police problem. In early times, when the solidarity of the kin was great, it was natural to look to the kin to hold its members answerable.[2] Later, such police responsibility was in part territorialised, and the hundred was made a kind of police unit and was required to bring to justice those who had committed crime within its bounds. But this solution was inadequate; the state still found it hard to deal with the criminal who had little or no property. The later and greater kings, who were striving to keep the country in order and who saw that greater efficiency in the local courts would increase their own revenue, found in the new grouping of men under lords a way to meet the police difficulty. Let the lords, men of substance and responsibility, be held liable for their men, and let all landless men have lords. Let there be no more lordless and irresponsible men wandering about the country, whom it was no one's business to bring to justice and from whom it was impossible to collect fines. Such was the substance of many decrees of the later Anglo-Saxon kings.[1] But the police function is a public one, a thing properly belonging to the state and to be enforced by the state's officers. The state was here using the power and position of private individuals at a point where its own means of meeting a governmental problem broke down. Such a shifting of a public burden to private shoulders is a feudal process,[2] and thus commendation came to have a significance that it did not have in its more purely economic stage. The relation created by commendation gave to the lord no judicial authority over his men. But placing this police duty upon the lords, albeit in connection with public courts, may seem the first step in gaining such authority. As a matter of fact, however, private courts in which freemen were tried, sprang from another source; but commendation and what went with it brought forth conditions favourable to their growth.

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[1] See *Translations and Reprints* (Documents Illustrative of Feudalism), pp. 3 and 6, for a bit of illustrative source material on Anglo-Saxon commendation.

[2] See above, pp. 18, 19, 21, 22, 25.

As already shown, the lord of a manor held his manorial court mainly for his serfs. To hold a court for one's unfree tenants, whether in the matter of civil disputes or of crime, was not a concern of the state; the serfs were one's property, or largely that. And there is no doubt that as the manorial system of agriculture developed, the freemen of the manor would be drawn into its court in matters touching their economic or property interests. But private jurisdiction proper, the power of a lord to hold a general criminal and civil court for freemen and enjoy its profits, had its origin in grants of *bookland*. In their earliest form, these were grants made by the king to some church, that is, to some bishop or abbot, of certain rights and privileges over a piece of land and the people on the land. The grants were evidenced by a written document, known as the *land-book*, and their permanence was further ensured by the anathema of the church.[1] *Folkland* was land that remained under the folklaw, that is, the unwritten, customary law—land over which no right, based upon a written charter or *book*, had passed.[2] The question, whether the king, in making his grants of *bookland*, bestowed the ownership of the land upon the church, is a difficult one. Did he give the land to the church and thus rob of their ownership all the people living on it?

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[1] "Thus positive legislation extends the relation of dependence; it is required that men must either have lands or have lords. The landless man may be still fully free, may have political rights, but he is dependent. The change has begun which makes freeholding, and not personal freedom, the qualification of political rights. The landless man is represented in the courts by his lord; his lord begins to answer for him, he is losing his right to attend on his own behalf, to sit there as judge and declare the law." Maitland, *C. H. E.*, p. 149. These men were glad to escape the burden, and thus, perhaps, did suit of court begin to be identified with landholding. See above, p. 18, note 1, and below, p. 103. If landless men must have lords, many small landholders were voluntarily seeking lords.

[2] For a fuller statement of the meaning of the term feudal, see below, pp. 73 and note 1, 99, note 1.

A satisfactory answer cannot be given because, in the middle ages, there was no sharp distinction between private ownership and the public authority which the state has over all its territory. The Latin word *dominium*, then in common use, generally implied something of both. It seems probable, however, that, in the early grants of *bookland*, the king did not give away the land, the ownership of which as far as ownership was conceived of, remained where it was already; but he did give away rights which, according to modern thought, no state could part with without destroying itself, that is, distinctly public rights. Yet the king could not carry this beyond a certain point, for, while he remained king, he was king over every foot of soil in his country, and, as such, there was something which he could not give away.

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[1] The idea of any kind of land grant by means of writing was undoubtedly Roman in origin and came into England through the church, the first to benefit by such grants. They introduced rights in the land which were foreign to the old tribal land law. For the text of a *land-book* of the tenth century, see Bell's *English History Source Books*, i., 79–82. See also *Translations and Reprints* (Documents Illustrative of Feudalism), pp. 8–10; 13, 14.

[2] See Vinogradoff, *Folkland*, English Historical Review, viii., 1–17. Before Vinogradoff's work, it had been the accepted view of historians that *folkland* was public land, the land owned by the folk as a whole.

Two questions may now be asked, the answers to which should show the part played by *bookland* in the changing Anglo-Saxon society. Did the grants establish a lasting relation between grantor and grantee, and, if so, of what kind? What were the things which the king gave away? In answer to the first question, it may be said that there was more of the out and out gift and less of the loan or conditional grant in these cases than one, having in mind the relations between the king and his great men at a later time, might suppose. Usually there was a previous obligation on the part of the king or the expectation of future service from the grantee. But there may have been cases where there was no relation between grantor and grantee either before or after the transaction, cases in which the king simply yielded to importunity or was trying to bring better order into a locality by placing more power in the hands of one man.

As to the second question, at least two things can be named that the grantee might receive. One was the right, when his men were fined in the courts, to take that part of the fine, the *wite*, that had before gone to the king. The other was the duty, in cases where a whole hundred had been granted, of acting as presiding officer in the hundred court. When, as was more often the case, only part of a hundred was granted there was no immediate placing of *bookland* holders at the head of courts; but the taking of the fines that were imposed in the hundred court seems to have been a long step towards it. Soon many holders of *bookland* were presiding over courts in the parts of hundreds that had fallen to them, the old hundred court often surviving, in a reduced state, for those men who were still on *folkland*. The point reached by this process at the end of the Anglo-Saxon period varied much from hundred to hundred. There were probably many hundreds that remained practically untouched by it. It will be readily seen how favourable was the state of society produced by commendation to the growth of courts presided over by great landholders. These courts were called *hallmoots*, probably to contrast them with the open-air courts of hundred and shire. They must be regarded as private courts, but the people of the time did not so think of them. Private courts were new, and they must wait some time before contrasting ideas of public and private jurisdiction could arise. It was an institutionally unconscious age. Moreover, men were then mainly interested in the financial side of jurisdiction. They were not asking whose courts these were, but who were to get the fines levied in them. They did not think that the king had given any one a court, which was thus changed from a public to a private court, but that he had given some one the right to receive fines in a certain district. On the eve of the Conquest, then, landlords could not *ipso facto* hold courts for freemen. Where such courts were held by them—and there were many instances in Edward the Confessor's reign—they did it as a special privilege or franchise from the crown, and it was looked on as a variant way of carrying on ordinary public jurisdiction in part of a hundred.

It has been said that the grants of *bookland* were at first made only to churches. Had they remained thus limited, they could not have caused changes of great importance. But their extension was inevitable, for there were nearly as many motives for making such grants to lay nobles as to bishops or abbots. The rapidly growing class of *thegns* was the class concerned. Whatever their origin,[1] the thegns in the later Anglo-Saxon period were forming a nobility of wealth and birth about the rank in society of the later country gentlemen: a man "throve to thegnright" when he acquired a certain amount of land, and the rank was heritable. An aristocracy was growing through economic differentiation of the freemen. There is much about the thegn that reminds one of the feudal knight of the continent and of post-Conquest England.[1] He was usually a warrior; but he fought on foot, he did many things for his lord surely not included in knight-service, and his service seems not so much based on his own holding as something which he owed to his lord's estate. To thegns the kings made many grants of *bookland.* Later, churches made them subgrants of the same character out of grants originally received from the king, and the thegns soon subgranted to other thegns or even to churches. This process went on rapidly from the late tenth century, and was uniting with the other economic and political conditions, which have been noted, to produce a change in society, feudal in character. But Anglo-Saxon feudalism did not have a chance to work itself out. Before it was at all complete, the Norman Conquest came and brought in new forces and ideas that immediately dominated.

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[1] See above, pp. 13, 14.

A sketch has been given of the classes in society before this feudalising process made itself felt;[2] it is necessary here to inquire what they were after it had been at work for some time and as we take our last look at Anglo-Saxon local conditions. At the bottom, were the slaves or serfs, as before; and here there had probably been less change than elsewhere. But some change there had been, and it was all in favour of the serf. In England, as on the continent, Christianity had been doing something to better his condition by persistently regarding him as a human being, and, wherever opportunity offered, by attempting to increase his rights. As early as the seventh century, the church was insisting, albeit with little success, upon the serf's right to the personal property which he had himself acquired. What has already been said about the difficulty the medieval mind found in forming clear-cut ideas of slavery of course applies here, as at the earlier time.[3] But despite this, there was probably a clearer line between the legally free and unfree than anywhere else in society.

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[1] See below, pp. 79 and note 1, 82, 97, 98.

[2] See above, pp. 12–14.

[3] *Ibid.*, p. 13.

Above the serfs, are found the names of classes and subclasses, the status and relations of which are very hard to understand. All within these classes technically freemen, their actual freedom varied infinitely; and this is much the same as to say that there was no uniformity in the conditions and services upon which they held and cultivated land. It was the size and character of their holdings that, more than anything else, determined their status. The difference in their status was not legal but economic. Following the evidence of Domesday on classes and sub-classes,[1] we come next to the *boors*. The *boor* received land, cattle, and tools from his lord, and to his lord these reverted on his death. He paid for the use of the land in fixed amounts of labour and in the products of the soil. Above the *boors*, was the very broad class of *villeins*. This word had different meanings at this time.[2] In the use just made of it, it approached in inclusiveness the old English word *ceorl*, and surely covered everything between the *boors* and the *sokemen*—perhaps it included the *boors*. In the villein class, there were three subclasses: the villeins (the term used here in a narrower sense), the *borderers*, and the *cotars*. But these terms were vague and the names of the subclasses varied much from place to place. The holdings of this class varied greatly in size, the normal holding of a man of the first subclass being about thirty acres, while the *cotars* probably had about five. The villeins (in the broader sense) paid for the use of their land in labour and in kind, often in money also. The land passed from father to son, and the holder could not be evicted while all the regular services were performed; but he probably had little freedom to dispose of his land. As to whether he had the right to quit the soil, it is hard to make a positive statement, for he probably seldom attempted it. This whole class shows the effects of the feudalising movements. While legally free, and distinguished quite clearly from the serfs, these villeins, owing to the hold the lords had gotten upon their land and services, and the jurisdiction which, in many cases, the lords had over them, were practically quite unfree. In the north and east of England there is evidence of a class of *sokemen*, the term freemen, *liberi homines* (used in some narrow and special sense), being also common. The men indicated by these names are not to be sharply distinguished from the villeins; probably in many cases, men who were called *sokemen* in one shire would have been called villeins in another. Taken as a whole, the class stood a little higher in the scale of actual freedom; in one way or another, the *sokemen* were a little less dependent upon their lords. They could choose their lords and were perhaps freer to "go with their land" from one to another. Some of them were lords themselves, but they were not, of course, noble.[1] Above the non-noble freemen were the nobles, the great landholders. These were the thegns, the earls, and the great ecclesiastics. It will be seen that, with fairly definite lines marking off the servile from the free, and the noble from the non-noble, there lay between the servile and the noble a vast body of men over whom a change was passing, a change that had gone just far enough to blur the old characteristics, but not far enough to bring out clearly any new ones. But the class was certainly dividing; some may have been "thriving to thegnright," but surely a much larger number was on its way to the class below.

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[1] Maitland, *Domesday Book and Beyond*, pp. 36–41. Writing more recently and following the anonymous and undated *Rectitudines Singularum Personarum*, Corbett makes the *boors* a numerous and more important class, pointing out that the name is a general one for peasant, in most Germanic tongues; while he places the *cotars* next to the serfs. *Cambridge Medieval History*, iii., 401–405. Terminology varied endlessly from place to place; but the Domesday evidence seems the more reliable if one is to venture the attempt at a general picture of Anglo-Saxon society at the very end of the period.

[2] *Villein* is from the Latin *villanus*, signifying one who lived in the *villa*. In England, this was, of course, simply a borrowing of the continental term, and does not imply a continuance of the Roman villa system. It was a Latin translation of *tunesman*.

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[1] There is a theory which has some plausibility that the *sokemen* were the descendants of the Danish freedmen or *liesings*. As members of the conquering army they had to be given holdings and a position in the vills somewhat above the Saxon villeins, and yet their former status precluded their becoming lords of the land like the free, conquering Danes. It is to be noted that very few *sokemen* are found in any part of England except where the Danes conquered and settled. See *Cambridge Medieval History*, iii., 354.

It will be noticed that in discussing these changes nothing has been said of the Danish settlements and conquests of the ninth, tenth, and eleventh centuries. The question naturally arises whether there were no relations of cause and effect between the Danish invasions and Anglo-Saxon feudalism. There is so little direct evidence upon the subject that no detailed statement can be made; and, probably, it would be easy to overstate the Danish influence. The Danes, who came from the continent in much the same condition as to society and institutions as their Anglo-Saxon predecessors, doubtless retarded for a time the manorialising process in those districts in which they became dominant; they tended to reproduce the earlier conditions of the Anglo-Saxon settlers in the east. As to the rest of England, the coming of the Danes seems to have had just the opposite effect; it placed a burden of war and defence upon the south and west, a burden that always depressed a peasantry; and it brought on a period of disorder and unrest favourable to the growth of private power at the expense of the state. There were notable contrasts between east and west in the late Anglo-Saxon period: there were many more people in the east, Lincoln, Norfolk, and Suffolk being the most densely populated counties, Shropshire, Stafford, and Cornwall the least; land was worth more in the east; also there were fewer slaves there, and in general the peasantry, with lighter rents and "works," were less exploited.

3. **The Central Government.**—*a. The King.*—Like most of the other Germanic peoples that invaded the Roman empire, the Anglo-Saxons entered Britain under the leadership of a king or kings.[1] But this is not to ascribe a pre-conquest origin to all the petty royal lines

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[1] For evidence of early kingship among the Angles, see Chadwick, *The Origin of the English Nation*, ch. vi.

that we hear of in England in the seventh and eighth centuries. The necessity of leadership, of united action, of military efficiency, was the great source of kingship among these early peoples. In the slow movement from east to west in Britain, there was great opportunity for disintegration, independent action, and the formation of new groups. In the petty leaders of tribes or groups of kin, was the stuff of which kings were made.[1] It would not be long before a heroic halo would gather about these primitive chiefs and a divine origin be created for them. They were symbols of tribal or national unity and consciousness; they were military leaders, and there were very many of them. One is in constant danger of associating with the word king ideas that may not belong to it in the special time and place under consideration. The content of the word expanded greatly during the Anglo-Saxon period, as the number of kings decreased, until the idea that the king should be the civil head of a centralised state was clearly present, though far from realised. The kingship of Edgar or Cnute was vastly different from that of Ceawlin or Ini.

The royal succession was regulated by that combination of heredity and choice which was characteristic of most of the early Germanic kingdoms; from a family that had, in some way, become recognised as the royal family, the most eligible member was chosen. The direct line of succession was not generally departed from unless there was some good reason, like a minority, for doing so.[2] But in certain instances, the designation of the last king seems to have had some weight, and it was not unusual for a king to associate his natural successor with him. It is particularly important not to read modern ideas into the act of choosing these early kings. At no time during the Anglo-Saxon period was there a body of men that was conscious of any recognised public right to elect the king. There might be a formal acceptance, by the great men, of him whom heredity or conquest had pointed out as their lord and leader; and such warriors and populace as had naturally gathered at the time and place at which a new sovereign was to be proclaimed might show their approval by acclamation. But these men, great and small, were acting in a personal capacity, not as standing for the nation. However, no presumptive king could feel at all sure of his throne until he had received this recognition.[1]

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[1] "The word *cyning* is in form a patronymic and would seem originally to have meant 'son of the family' (*i.e.*, presumably the royal family or family of divine origin). If this suggestion is correct it would appear that *cyning* was originally not a title of authority, but rather equivalent to the modern word 'prince.'"—Chadwick, *Studies on Anglo-Saxon Institutions*, p. 302.

[2] But it is to be noted that the successive minorities of Edward the Martyr and Ethelred II. did not interrupt the direct line.

No detailed account can be given of the growth of kingship during this period. In the early days, there were many small, distinct peoples with their petty kings or chiefs. But throughout there was a tendency to coalesce into larger and larger groups. The well-known seven kingdoms, often called the heptarchy, represent one of the longer stages in this process. These kingdoms were very unequal in size and strength, and it was inevitable that, sooner or later, the strong should lord it over the weak, and that finally one kingdom should attempt to rule over all the others. Unquestionably the Anglo-Saxons were in a stage of civilisation fitted for larger political units than those into which they had been broken by a prolonged overseas invasion and conquest. In the seventh century, the Northumbrian kings, though hotly rivalled by Mercia, ruled more widely than any before them; this supremacy passed to Mercia in the eighth century; then to Wessex early in the ninth century, where it remained with the descendants of Egbert until the Danish conquest. The smaller kingdoms gradually lost their status, and Kent, Essex (much reduced in size), and Sussex became shires;[2] East Anglia soon shared the same fate, being divided into two shires. Northumbria and Mercia lost their identity as kingdoms during the great Danish invasions and settlements of the ninth century, most of Northumbria and half of Mercia becoming the Danelaw. Such unity as England attained in the Anglo-Saxon period did not come from a union of kingdoms, but from an expansion of West Saxon rule, under Alfred and his powerful descendants, over some southern and eastern shires that had once been kingdoms, and through conquest in the tenth century of the lands that had been seized and settled by Danes and Norwegians.

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[1] See Chadwick, *Studies on Anglo-Saxon Institutions*, pp. 357–366.

[2] See above, p. 15.

It was during the period of struggle among the early kingdoms that Christianity spread throughout England; and Christianity had much to add to the Teutonic conception of king, as well ideas derived from the Old Testament as those of a strictly Christian origin. Kingship was strengthened, made more grand and inviolable; for the missionaries and other clergy understood, from the start, that the central power was their natural ally against the forces of disorder and division. The consecration of the king, which included the anointing and the coronation, became a religious ceremony, almost a sacrament, performed by the clergy. Although the crown existed in heathen times, yet there was nothing that could properly be called coronation; the custom of lifting the accepted king upon the shields of the assembled warriors differed widely from the solemn and dignified procedure after the church had invested kingship with its sanction and glamour. Probably the Anglo-Saxon king owed less to this sanction and to any semi-religious or priestly character which he might derive from the consecration than was the case in many countries, France for instance. He kept much of his old character of the accepted lord or war-chief of his people. But the gift of Christianity was substantial and the content of the word king was broadening.

With the Christian religion, there came into England some Roman ideas of government, probably in not very distinct form or in very large numbers. But in Ethelbert of Kent's written laws we see beginning to work the idea that a central power should be something more than a military leadership. And the laws themselves, which had a notable effect upon the legislative work of his successors, were surely the result of Roman influence.[1] Several instances are known in later Anglo-Saxon history where continental and originally Roman influences affected the action and ideals of kings. In the long-continued, and apparently fruitless, attempts, repeated in almost the same form generation after generation, to bring criminals to justice and bolster up the weaknesses of the local courts, we see a struggling of kingship towards a higher realisation of itself. Some promptings were certainly Roman; and it was in this general way, rather than through the more tangible gifts of laws or institutions, that Rome touched Anglo-Saxon government. The idea that they could be something greater reached the Anglo-Saxon kings from the continent, but they used crude, Teutonic methods in striving to realise it. The large differences between the late Anglo-Saxon kings and the early may, then, be thus summarised: the late kings ruled over larger and more diversified populations and had to deal with new problems in government—they were no longer petty kings; they had become Christian, and were strengthened by the church's conception of monarchy; they regarded themselves as civil rulers who were bound to keep order and promote their people's welfare.[2]

The powers and privileges of a sovereign of the house of

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[1] In levying tribute from subject kings and perhaps in the use of the *hide* as a unit of assessment the same influence is seen. The hide, of which much is heard in later times, dates back surely to the seventh century; it was based on a unit of 120 and was not then a measure of land, but appears to have had some reference to population. Modified and misunderstood, it remained for about four centuries the basis of reckoning the military or financial obligations of various districts of England. For its later use, when it generally meant 120 acres of land, see below, p. 119 and note 2.

[2] The fact should not be overlooked that much of the activity in making the local courts more efficient had a revenue purpose behind it. But most governmental progress has lain in the operation of intelligent selfishness. However, a society that could train the heathen Cnute into the kind of king he came to be was not without ideals. It also had not been without some attainments in centralised government.

Alfred were very strictly limited by the customs of the kingdom. But it cannot be said that the function of enforcing this limitation was vested in a clearly defined way in the king's council. This council, known as the *witan*,[1] an assembly of the great men of the realm, certainly exercised, at times, much power. The part that such men played in the choice of king has already been noticed, and we know that the king's continuance in office often depended upon their favour. In the performance of any important act, their consent conferred an added authority. But the relations of king and witan were never made clear, and so great variations in practice were possible; when the king was weak, the witan seemed to do all the governing; when the king was strong, its share in government was small. On his accession, the king must take a notable oath. It was a threefold promise: first, that the Christian church should be kept in peace; second, that all sorts of injustice and violence should be forbidden all men; third, that, in his judgments, he would exercise justice and mercy that he might hope for the same from a just and merciful God.[2] The Anglo-Saxon king was no irresponsible potentate; the people had no thought of such a ruler. Their sovereign must not violate the customs and traditions of the country, and, if he did not, there was nothing to prevent his attaining much actual power; if he did, the people resisted him irregularly and personally rather than by recognised public right.

As to his property, the king was, in many ways, situated like a private individual; but probably no private individual ever had so much. There was no land belonging to the state as contrasted with that which the king held personally, just as there was no distinction between the public treasury and the king's private purse. There was not governing enough done at the centre to make elaborate machinery necessary; all was primitive, personal, and on a small scale. The king's revenue consisted, in the first place, of what was paid him by the tenants on his land, just as in the case of any landlord; in the second place, of his judicial income, the penal fines from the local courts; in the third place, of purveyance. All medieval kings travelled much, for much of their income was paid them in kind and might have to be collected and used on the spot. In their endless progresses through the kingdom, they were conveyed and maintained largely at the expense of the districts through which they passed, sometimes taking commodities outright, sometimes below market price. This was purveyance. Besides these chief sources of revenue, there were many of a minor character, such as the proceeds from mines and salt-works, wrecks, treasure-trove, various special tolls, etc.

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[1] See below, pp. 52–58.

[2] *Ibid.*, pp. 115, 259.

It will be noticed that no mention has been made of taxation. In its usual and specific sense, a tax is "a charge or burden laid upon persons or property for the support of a government." There was something of this, no doubt, in purveyance, but only in an irregular and obscure way. There was but one true, national tax in the Anglo-Saxon period, the Danegeld. This was a land tax and is usually dated from the important levy of 991;[1] but throughout the reign of Ethelred II., it was a tax, in the strictest sense of the word, only from the point of view of incidence, assessment, and collection. It was not a regular levy to pay the expenses of government, but a matter of emergency with nothing of the sort preceding it and with no thought of its continuance in any form. But Cnute did continue it and began its transformation into a regular charge for the support of government. It was only upon its revival by William the Conqueror, however, after an interruption during the reign of Edward, that this transformation was at all complete. And it must be understood that, neither in the Anglo-Saxon time nor for long after, did the people of England grasp the idea that upon them rested a direct financial obligation to support their government. The king had his revenue; let him live on that; let him "live of his own," to use the common expression of a later time. To the end of the Anglo-Saxon period, central government was so personal and so slight that it was not thought of as something in which all the people had a regular and vital concern.

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[1] There had been money raised to buy off the Danes at earlier times, but it was from 991 that such levies became frequent enough to make possible the development from them of a true tax. It is possible that *lastage*, a system of export duties collected at certain ports, existed before the Conquest and was something in the nature of a national or semi-national tax—more at that time than later. See N. S. B. Gras, *The Early English Customs System*, pp. 28–33.

Our knowledge of how the Anglo-Saxon kings kept their valuable possessions, such as their robes, regalia, and such coined money as they had is very slight. The collection of the Danegeld in addition to the regular revenue from the shires, must at times have brought considerable treasure into their hands. The heart of the king's household was his chamber, where he slept. Here or in some room or closet adjoining, a wardrobe, his robes were kept. Chamberlains had charge of these possessions and it was no light charge in view of the king's almost incessant travelling. The chamberlains must be men of trust and they must be agreeable to the king, for they were of necessity much with him. The king's money chest, his strong box, was in his chamber, and as his lodgings moved so must it. A chamberlain was the treasurer; there was no separate office of treasurer. There is some evidence that very late in this period, the king's chamber in his castle in Winchester became something of an abiding place for his money, that there was more of it there and for longer times than in his other residences. But we can speak of no separate treasury. All was simple and personal. But out of such simple and personal things as chamber and wardrobe and such personal service as that of the chamberlains were to spring many public departments and offices in the later time of greater sophistication and developed central government.[1]

b. The Witan.—The Anglo-Saxon kings governed in connection with a body of men known as the *witan*, the wise men.[1] The origin of this assembly cannot be traced with entire certainty. Tacitus states that the German tribes which he knew had two assemblies: one was a general meeting of the armed freemen of the tribe and dealt with the more important matters; the other was a meeting of the chief men of the tribe, and determined lesser things and discussed in advance the greater, the final decision of which lay with the larger body. Some writers, who have been zealous to prove that the Anglo-Saxon kingdoms were never without democratic, deliberative assemblies, have regarded the witan as a decreased and degenerate survival of the larger of the old assemblies, arguing that, whereas only the great men ordinarily attended, the whole body of freemen had the right to do so; and adducing, as proof of this, instances in which large concourses of people were spoken of as being present. This proof is unsatisfactory since such instances were rare, and, what is of more importance, were occasions upon which the populace would naturally gather, such as the acceptance of a new king, the issuing of some edict of war or peace, or the like. It is not necessary to explain the gathering of a crowd at such times by a theoretical right to attend the meetings of the witan; and there is not the least evidence that these crowds became, in any sense, part of the witan or engaged in any deliberations. Furthermore, there is no proof that the primitive Anglo-Saxons ever had a national assembly either in England or upon the continent. But it is certain that the early kings had councils consisting of members of the royal family, officials, and great warriors, bodies that correspond to the smaller assemblies described by Tacitus. From such councils the witan seems to have descended.

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[1] See below, p. 124, and Part III., § II., 3, *passim*.

The make-up of the witan cannot be clearly defined. The name itself is vague and indicates a shifting personnel, not one based on strict theory; but we may be quite sure that the "wisdom" of those summoned was measured mostly in terms of wealth and power. The king determined largely who should attend. It ordinarily included the royal household, the great lay and ecclesiastical officials, such as ealdormen, bishops, and great abbots, and men whose wealth, influence, or attainments made the king wish their presence or afraid to do without it. As a general thing, the attendance of a large number of men who held no official position indicated the king's power. Most of those whose influence was irksome or threatening to the king would be in an official or semiofficial position. Many thegns came in the later period, and the great men who lived in or near the meeting-place would be likely to come.[1] But it was always a small body, generally much below one hundred. The sessions were not long and there seems to have been little regularity in its time of meeting; it was often on a great church festival, as Christmas or Easter, but not uniformly so. It met at least once a year, usually oftener.

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[1] *Witenagemot* (*witena*, genitive plural of *witan*, plus *gemot*, assembly) "does not appear to have been an official term."—P. and M. i., 40, note 4. The best discussion of the name is to be found in Liebermann, *The National Assembly in the Anglo-Saxon Period*, pp. 6-12.

The business of the witan was varied and unclassified; it was the king's advisory body, it gave him moral support. But as has been said, the character of the king largely determined its influence at any given time. In the very late Anglo-Saxon period its authority was decreasing. The power accumulated in the hands of the two or three great families of earls weakened it. One should be especially careful not to ascribe to the witan the traits of a modern parliament. It was not a representative body, and was not standing for the people's rights as against the king's power or in any other capacity. In most that it did, it acted in conjunction with the king; and, as far as it stood for anything opposed to him, it would be primarily for the aristocratic interests of its members. Only when, in the case of some very broad abuse, the interests of all classes for a time coincided, may it have acted in the people's interest. While the witan's routine work was what we should call administrative, yet it had its share in what was perhaps the most notable achievement of the Anglo-Saxon central government—the written laws. While most of the law of the country was local and unwritten, unconsciously made by the people and administered by them in the local courts, yet at intervals throughout the period, kings, actuated by various motives, put laws in writing which, taken together, make a unique record in legislation for that time. At the beginning of the seventh century Ethelbert of Kent issued ninety brief laws, called *dooms*,[1] the first laws of a Teutonic people in a Teutonic language. It is remarkable that so immediately after acquiring an alphabet and the art of writing from the Roman missionaries, writing should have been used for Anglo-Saxon; yet the evidence is good that these laws were from the start in the vernacular. The purpose appears to have been to make clear the rights and special privileges of the new Christian clergy and to publish a long list of fines for a variety of misdeeds, perhaps thereby striking a balance or compromise for the whole of Kent amongst divergent local penalties. It certainly could not have been an attempt to codify the Kentish law, as even the most superficial reading will show. The Anglo-Saxons did not feel the same need to preserve their native law by codification as did the Germanic peoples who had invaded the Roman Empire on the continent and who were living in the midst of a more numerous and more civilised population who used the Roman law. Later Kentish kings of the same century issued laws which were little more than revisions of, and small additions to, Ethelbert's *dooms*. Then at the end of the century Ini began lawmaking for Wessex, his motive perhaps being to regulate the treatment of the Welsh, many of whom he ruled. It seems likely that there were early written *dooms* in Northumbria and East Anglia, and it is known that Offa of Mercia made laws in the eighth century, but these have been lost while those of the Kentish kings and of Ini have come down to us. After Offa there was an interval of about a century in which no written laws were made. Legislation was, in a sense, refounded and made a normal function of the central government under the West-Saxon dynasty by Alfred. Alfred's laws differed somewhat from those of earlier kings in that there was more of the codifying purpose: he went through the earlier laws to select the best, making, he says, small changes and additions of his own. In Edward the Elder's laws there was regulation of the four-weekly court later identified with the hundred, also more rigid provisions for buying and selling before witnesses; Athelstan's were broad in scope, emphasising the lord's responsibility and that every man must have a lord, and they also experimented with groups organised for the pursuit and apprehension of criminals, a systematising of the probably older hue and cry obligation in London and vicinity;[1] Edmund's (perhaps under Dunstan's influence) were hostile to private war and the kin responsibility in connection with the system of *wers* and favoured the responsibility of each man for his own acts; Edgar's are notable for stressing church obligations, rules for buying and selling, the hue and cry police groups, and first show clearly the nature and times of meeting of the different local courts. The written laws of Cnute, the Danish conqueror of England who in this matter of legislation as in so many others followed English custom, were comparatively numerous, and were divided into two parts or enactments, one ecclesiastical and one secular. Though often called Cnute's code only a small part consists of earlier *dooms*. It was lawmaking of a high order and brought the Anglo-Saxon *dooms* to a noble conclusion, for the Confessor made no laws. By Cnute,

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[1] For a detailed discussion of the composition of the witan, see Chadwick, *Studies on Anglo-Saxon Institutions*, ch. ix., and Liebermann, *The National Assembly*, pp. 28–42.

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[1] The use of this word shows that there was in mind no distinction between a court judgment and this act of king and witan, which, lacking a better term, we call legislation. Whatever of addition to, or modification of, unwritten custom these *dooms* contained seems not to have been incompatible with their idea that *law* was a thing immemorial, fundamental, not makable. See below, p. 411 ff.

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[1] See below, pp. 67–69.

"the principle of equality before the law is distinctly stated: the magnates were to have no unusual privileges in the courts of justice."[1]

These Anglo-Saxon laws were in many respects like the *capitularies* of the Carolingian sovereigns, but were not contemporaneous; they were revived by Alfred just as the Frankish legislation was declining, and continued through a time when, on the continent, no laws were made by a central power. They were the rule from Alfred's time on, coming from weak and strong alike, Anglo-Saxon and Dane; they were the custom of the country. "The Norman subdues, or, as he says, inherits a kingdom in which the king is expected to publish laws."[2] It is hard to generalise upon their character, for we know so little of their great background of unwritten custom. Were they declaratory; were they consolidation—*i.e.* a balance struck among local differences; were they new? All three sorts, perhaps, are to be found in what was put forth in most of these reigns, but who shall say in what proportions? At any rate law was made on a scale and with a continuity unprecedented in the new Europe. The central government in England was working under favourable conditions: the country was small, with comparatively plain surface and definite boundary; for some reason kingship did not destroy itself as it did in many other places by dividing up the state among sons or other relatives like a private inheritance; and the church worked so closely with the state that no rival ecclesiastical law grew. Through these laws one gets the clearest indication and explanation of much that was best in the Anglo-Saxon state.[3]

The king and witan also constituted a high court of justice. This was not a court of appeals, but a court of first instance for cases of great importance, for example matters relating to bookland. Of the cases that for various reasons failed to reach a judgment in the local courts, those that were allowed to come before the king were surely not all dealt with by the witan; some probably came to a smaller group of councillors.[1] Despite high-sounding functions it is to be remembered that the real power at the centre was the king; the witan's work was small and distinctly advisory to the end; also that the whole central power came into little actual contact with the people. The witan did not have enough to do to bring about, even in the course of centuries, a self-conscious development of powers and privileges. It had "germs which seemed fruitful enough in the seventh century," but they failed to develop. It

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[1] L. M. Larson, *Canute the Great;* on Cnute's laws see pp. 274–278.

[2] P. and M. i., 20.

[3] For a convenient annotated text and translation of these laws from Ethelbert to Athelstan (inclusive), see F. L. Attenborough, *The Laws of the Earliest English Kings.* Excerpts are to be found in Stubbs, *Select Charters* and in many source books.

> omitted to organise itself as an independent institution, to determine rules as to who should be summoned and how, or when and where a meeting should take place, to fix its competence, proceeding, recording, and executive force, and lastly to limit its sphere over against the rival powers of the king, court council, and ecclesiastical synod.[2]

4. **The Anglo-Saxon Church.** — The Anglo-Saxon church was in peculiarly close relations with the civil government, both central and local. It is to account for and explain these relations that its history is touched upon here. The kingdoms of the heptarchy were Christianised in the seventh century by missionaries, largely monastic, coming either from the continent or from one of the kingdoms that had already received the new religion. It was the practice of these missionaries to gain first, if possible, the favour of the king and great men, trusting that the

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[1] Liebermann (*The National Assembly*, p. 68) ventures to call such a group "the king's judicial court, to which the plaintiff could apply who at home in the local court had not been able to obtain a judgment or its execution."

[2] *Ibid.*, p. 89.

people, in large masses, would accept the religion of their leaders. Such acceptances *en masse* were quite common, and, in general, the Anglo-Saxons adopted Christianity readily. Where resistance was made, it was usually on political grounds, the prejudice felt against the religion of an enemy, whether that enemy were the native British[1] or some neighbouring Anglo-Saxon kingdom. Christianity was not at first preached, to a great extent, to the lower classes; it was, from the start, the religion of those in authority, whether in the central government or in the local courts. But as time passed, it worked downwards and touched larger and larger numbers of people; it did not come, as with the Germanic invaders on the continent, from daily contact with a more numerous subject population that was Christian. It is also to be noted that Christianity came to England through missionary efforts straight from the pope, not from life in a Christianised empire. Hence the Christian church in England was not the medium through which passed imperial institutions—its bishops were not secular officers, as on the continent.

There was little organisation in the newly established church; in each little kingdom or subkingdom, at some natural centre, perhaps a favourite royal residence, there would be some sort of church establishment with a bishop at its head, and with a mixed group of clergy usually living under some monastic rule. From this point of light, maintained by royal protection, missionaries were sent out into the unconverted parts of the kingdom. It was a system suited only to a half-Christianised country; it was on a missionary basis.

The change from this primitive condition to a fully established and permanent church was largely the work of one man. This was Theodore of Tarsus, who was archbishop of Canterbury from 668 to 690. With but few important later changes, the church remained what he made it up to the time of the Danish invasions and conquests late in the ninth century. His greatest work was the creation of the dioceses. The diocese, the territory over which a bishop had control, was the fundamental division in Roman church polity. It is sometimes said that Theodore divided existing dioceses into smaller ones; but, as just stated, the small kingdoms, considered as fields for missionary effort, were about the only ecclesiastical divisions before his time. Even granting that early churchmen sometimes took account of the smaller, tribal divisions in organising their work, it would be doing violence to later ideas to call these dioceses in more than one or two instances.[1] It had been the purpose of Pope Gregory I., when he planned the Christianising of England, to have two co-ordinate archbishoprics established, one in the south and the other in the north. This was not carried out, however, and Theodore made his organisation upon the basis of one metropolitan church, that at Canterbury. It seems to have been owing to the influence of Bede in behalf of northern England that the bishop of York was made archbishop in 734.[2] During part of the same century, owing to the political supremacy of Mercia, Lichfield was recognised as an archbishopric.[3] But the normal arrangement, from the time of Bede to the disruption of the church in the north by the invading Danes, was a division into two archbishoprics and seventeen bishoprics, the latter often coinciding with old tribal boundaries. The bishops of these dioceses lived, for the most part, in small places instead of in the cities, as was the practice upon the continent. The English bishops, in a very real sense, ruled over districts or peoples and were far less fixed in residence than were the continental bishops. The division of dioceses into parishes has been ascribed by tradition to Archbishop Theodore; but the parishes grew slowly, largely as great landholders cared to build and endow churches for their estates—a parish origin which was the origin also of the prevailing lay patronage of the localities, the family which had built the church and endowed it with lands retaining a kind of proprietorship through naming the priest. But for long many townships were only irregularly served by travelling priests from such monastic groups as were in the diocese. Parishes were not created by superior church authority, and there was no complete system of parishes for several centuries. The parish was usually merely the township regarded ecclesiastically, the region under the care of a single priest. In the wilder and more thinly settled part of the country, a parish often included several townships or hamlets, and, in some cases, has always continued to do so.

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[1] The story of the failure of the early Roman missionaries to reach grounds of understanding and co-operation with the British Christians, and of the difference in ceremonies, reckoning Easter, etc., which helped keep them apart, need not be repeated here. The Celtic forms disappeared in Wales practically with the adoption, about 768, of the Roman method of reckoning Easter. A student of Bede's work, a monk of Holyhead, was instrumental in this change. They lasted long in Scotland and Ireland.

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[1] The dioceses of Canterbury and Rochester correspond to the ancient divisions of east and west Kent. In very early times, these territories often had different kings.

[2] A bitter rivalry often existed between the two archbishops, leading sometimes to the most undignified quarrels. The question of precedence was not satisfactorily decided in Anglo-Saxon times. See below, p. 129.

[3] It was made an archbishopric about 735 and ceased to be one through action of the Synod of Clovesho in 803. King Offa of Mercia, in return for the pope's concession in making a Mercian archbishopric, agreed to pay him an annual sum of money. This was the beginning of the tribute, later made general in England, known as Peter's Pence.

In the little that can be said of the government of the early church, we note especially how it was related to the state. Church councils were very irregular. Two that were held in the time of Theodore seem to have been for all England; after that they were for the provinces of Canterbury or York. These were regularly attended by the bishops and many of the abbots, and, while their business was of course ecclesiastical, yet a good many laymen of importance appear to have attended just as churchmen were to be found in the witan. Church and state worked together, for they had the same end in view, the maintaining of as much orderly unity as possible. Indeed it seems probable that from early in the ninth century the church council merged into the witan of the West Saxon kings.[1] In this connection it is specially important to note that the Anglo-Saxon church had as much unity when England consisted of several separate and hostile kingdoms as after an approach to a single state had been reached under the West Saxon dynasty. Considerations of geography and race had made it natural for the pope and for others influential in its organisation in the early days so to shape it. In the ecclesiastical realm, the Anglo-Saxons must, from the start, have thought of themselves as one people or at most divided into two provinces. Theoretically the English church, like the other churches of western Europe, remained under the control of the pope, but its distance and its insularity worked towards a weakening of the connection, and in practice that control or any papal interference amounted to little.

In judicial matters, the union of church and state was even closer. The clergy were amenable to the hundred and shire courts in all matters of which these courts took cognisance; they were under their jurisdiction to the same extent that laymen were. Hence the presence of bishop and priest. In criminal cases, a special procedure was necessary in the case of clerks, and the bishop was in the court, "in the relation of lord and patron," to declare what this procedure was. But the bishop was also regarded as a learned and needed member of the court with respect to its jurisdiction over laymen, especially in matters touching morals. There were some distinctly clerical offences, breaches of ecclesiastical regulations, heresy, and the like, that

would not come before the popular courts, for they were not breaches of the secular law; and they were not crimes for which the penitential jurisdiction alone was sufficient. For such, then, it is probable that the bishops had domestic tribunals not differing in kind from the ecclesiastical courts of later ages.[2]

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[1] See Joseph C. Ayer, *Church Councils of the Anglo-Saxons*, printed in Papers of the American Society of Church History.

[2] Stubbs, *Constitutional History of England*, § 87.

In its penitential system, the church had a power, of a semi-judicial character, a restraining influence, in matters of morals, over both clergy and laity.[1]

Monasticism was an important institution in England, as elsewhere in the early church. As we have seen, England was Christianised largely by monks, and, in very early times, monastic establishments were the chief centres of Christian influence. About a dozen houses were founded rather early in the seventh century, East Anglia being a leader in this movement. The rule of St. Benedict was introduced by Wilfrith in Theodore's time, but it never became universal in Anglo-Saxon monasticism. In fact, there was from the beginning too much irregularity in the English system to ensure a long period of purity and usefulness. Its decline became marked in the eighth century; Bede speaks of it very early in that century. But in the first flush of enthusiasm, when many men and women of the nobility, and even of the princely families, aided in founding monasteries and actually entered and managed them (a source of corruption in the course of time), there was a short period during which the good far outweighed the evil. At this time, indeed, the whole Anglo-Saxon church, and especially that of Northumberland, stood for greater sanctity and learning than was to be found elsewhere in Christendom, with the possible exception of Ireland.

The Danish conquests of the ninth century threw large parts of England back into heathenism.[2] Four or five dioceses ceased to exist, and several were, for some time, in a precarious and unsettled condition. The province of York, of course, suffered most; and, even when the newly settled regions had been reclaimed to Christianity, the northern archbishopric stood aloof from the southern, and there was really less unity in the church than there had been in the earlier centuries. This was simply a reflection in the church of the political separation of north and south which the Danish invasions and settlements caused. In the south, church and state were brought into even closer relations than before; and in this later time are found the first instances of archbishops of Canterbury playing the part of statesmen and of advisers and intimate friends of kings, something which became more common after the Norman Conquest. Spiritually the church declined after the Danish invasions. It lacked recuperative power. The monastic abuses became greater and the Benedictine rule was almost forgotten. Monastic property was in many places in the hands of married canons or lay sisters whose object was wealth and luxury. Dunstan and other great churchmen of the tenth century strove to better conditions and to bring into England the principles of the Cluniac reform.[1] England had once sent missionaries and scholars to the continent and been regarded as a leader in religion and learning. Now the relations were reversed, and monks were sent to France to learn and reintroduce the Benedictine rule. There was a temporary improvement, but the great continental reform bore no permanent fruit in England. Cut off so completely from papal leadership and influence at a time when much of value might have been gained from them, the English church, on the eve of the Norman Conquest, presented a peculiar and provincial aspect. Owing to its isolation and the ravages of the heathen Danes, it had dropped behind in the general forward movement of Christendom. An intimate connection with the state, rural bishops living in close contact with the people, an irregular and decadent monasticism, an undignified rivalry between its two archbishops, great independence of the pope, some antiquity and barbarity of custom and ceremony—these were the leading characteristics of the pre-Conquest church.

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[1] It should be remembered also that bishops or abbots who had received grants of *bookland* had, over the people on the land, that kind of jurisdiction that has been described above, pp. 40, 41.

[2] Even in the time of Cnute, Denmark and Scandinavia were largely heathen. Sweyn had been baptised, but was no Christian. Cnute was nominally a Christian, probably before his conquest. Sweden was practically heathen for some time after. In Norway, the two religions were battling for supremacy in the eleventh century.

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[1] J. Armitage Robinson, in his recent book, *The Times of Saint Dunstan*, while emphasising the importance of Dunstan's work, believes that its inspiration and method were not so largely continental as has generally been supposed.

5. **Conditions on the Eve of the Conquest.**—In taking leave of the Anglo-Saxon period, we are concerned especially to note those aspects of government which are likely to remain of importance after a conquest which brought in, not a large new population, but a new king and the aristocracy of a conquering army in which were many nobles or those who could appropriately become nobles. The new ideas which such a conquest was bound to bring with it would relate to the central power and to large-scale landholding. What would remain important would be the local government (full nine-tenths of all the governing there had been in the Anglo-Saxon period) and small-scale landholding. And it has been sufficiently insisted upon that government and landholding had a close connection in the middle ages.

Judged comparatively Anglo-Saxon England had been peaceful. It was something over five centuries from the time when the Angles and Saxons themselves had completed their conquest and settled down to a fairly quiet life to the Battle of Hastings. During that time there had been the one great destructive episode or series of episodes—the Danish invasions and conquest. But taking those into full account there had been long periods and large areas of country that had enjoyed peace. There had been no important or long-continued peril on either the Scotch or Welsh border. The Danish peril had been the one great peril for deliverance from which the Anglo-Saxons prayed. It is beyond question that insularity with its comparative security had played its part in bringing the Anglo-Saxons to the eleventh century, through a long period of settled life in which were the feudalising tendencies incident to a growing population and demands on government, with a large part of the people still neither distinctly noble nor servile. It is the ever-present fear and burden of war that splits a people into a fighting nobility and an oppressed peasantry. This had happened in many places on the continent as it had not on the island.

A vast deal of study has been put on the question of the freedom or non-freedom of the bulk of Englishmen both before and after the Conquest, and the answer must be that the bulk were not nobles or slaves and that they did not understand technical, absolute freedom or non-freedom. It seems more profitable in a book which touches human progress towards self-government, to raise the question of public responsibility. To what extent and in what ways were common men (whether "free" or not) called upon by any public authority to do things of a public nature which demanded and developed qualities of initiative, self-reliance, judgment, self-control? A slight knowledge of this period shows that the ordinary Englishman was expected to do many things which had no direct connection with the economic problem of daily bread, and that he took these as a routine part of his life as much as sowing and reaping his fields.

Attendance at the local courts—hundred, shire, borough, or manor—immediately suggests itself as one of the most routine obligations of the people. Who went and how often are matters that have already been discussed.[1]

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[1] See above, pp. 17, 18. In the so-called Laws of Henry I. (*Leges Henrici Primi*), an important law book compiled about the middle of Henry I's reign and which was an attempt to state Anglo-Saxon law with the changes made in it by the Conqueror and Henry I., is found the following famous and puzzling statement: "If any of the king's barons or others shall be lawfully present at the shire court, he shall be able to acquit the whole land which he has there in his demesne. It is the same if his steward shall be lawfully present. If both are of necessity absent, the reeve and priest and four of the better men of the vill shall be present for all who shall not have been summoned to the plea by name. We have decreed that it be observed in the same manner in the hundred . . . concerning the presence of the lord and steward, or of the priest and reeve and better men." There is earlier evidence that the lord was coming more and more to represent his landless men—the men of his household and his demesne lands, without farms of their own—but we have no contemporary evidence of the reeve and four men acting for the vill or any element in it in Anglo-Saxon times. Yet this statement may contain genuine Anglo-Saxon custom. If so, the practice probably arose late in the period; otherwise some trace of it would be likely to appear. We shall hear much in the twelfth and thirteenth centuries of the doings of the reeve and four men of the

But it is to be remarked here that an examination of the make-up of these court assemblies will show that many of the same men had to go to both hundred and shire, some to both hundred and manor, and some to both shire and borough. There were probably other duplications, and we do not know how much in the way of market or inferior borough courts. In all courts the critical decisions—when the case should end, who should furnish proofs, and what the proofs should be—lay with the people. They were the courts; neighbours judged one another. In connection with the whole procedure, especially perhaps in connection with the tariff of fines, the people must know much law, or call it the legal lore, of the locality. They must keep up also with those amendments and additions which king and witan were making, the written laws. As to the litigants, a man conducted his own case from summons to collection of fine, or he defended himself in litigation; and success depended upon knowledge and observance of form. Litigation may seem to us occasional and largely voluntary, but in this early society there was little routine protection of person or property: on many occasions in a man's life he would probably have to litigate or fight or suffer wrong. In the litigation of others there was great force of moral obligation or social pressure which drew men in. They might be asked to come in the suit of witnesses which established a *prima facie* case, they might be called upon to witness sales with much chance of bearing testimony on the matter later in court, and especially in compurgation men were constantly coming to court for their neighbours (for compurgation was ceasing to be an affair of the kin), and often ran great moral risks.

Something has been said of the hue and cry and suretyship,[1] and something more must be said here, for these

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vill. They embody an important representative idea, and we wonder how the four men were chosen. It is one of the earliest traces of the representation of a group by any of its own members, and it shows some kind of public function performed by men, most of whom would not be freemen.

[1] See above, pp. 18, 19.

institutions were developing fast just at the end of the period. When the hue and cry was being organised in the time of Athelstan and Edgar, the word *tithing* emerges in connection with these police groups for the pursuit of criminals, a word which raises unanswerable questions. Athelstan's London tithings were surely groups of ten. What was the more general police tithing of Edgar—whether numerical, territorial, or a combination of the two—cannot be stated.[1] It was organised with a man at its head known as the *tithingman*, and, what is of most importance, Edgar and later kings intended it to be and tried to make it compulsory. As to suretyship, kings were no sooner making use of the lord and man relation to do away with lordless men and make lords responsible for the appearance of their men in court and for the payment of their fines, than we find the lords attempting to shift this obligation. This was not simply to be rid of a burdensome duty to king and public courts; but the lords were more and more having courts themselves in which they were the recipients of a goodly share of the fines. They did not want to be sureties for fines which they themselves were to receive. At this time it was an accepted principle that one surety or pledge was enough for the man of good reputation, and that pledge was usually his lord. But the man of bad reputation was expected to have more than one, a collective pledge, many or all of whom were likely to be his kinsmen. The lords seem to have seen in this a way of escape from their own burden. More and more people were looked upon as "likely to be accused," and the lords furthered this. Before the end of Cnute's reign the collective pledge had lost its kin character. It was composed of a man's neighbours, and the lord did not care whether they were kin or not. One thing is sure, perfectly decent men were under pressure to find pledge-groups which a little earlier would have been appropriate only to those of suspicious character. How great was this pressure or just how it was applied cannot be told. Surely the kings were not trying to make these pledge-groups universal and compulsory as they were the tithings. But the two began to merge, probably from about 1030. They were bound to do so once they were side by side, for the groups were sure to overlap or coincide in personnel and their duties bore a close relation. The supposed criminal which the tithing must pursue might be one of the tithing which, under the aspect of pledge-group, it was bound under heavy fine to present in court. How far the merging went before the Conquest we cannot say, but not in the Anglo-Saxon period had the king or any other authority made the pledge-groups universal or an absolutely binding obligation. There was something voluntary about them to the end of the period. But these institutions are striking instances of public responsibility resting upon the people. They are the germs of the later frankpledge, one of the most curious, characteristic, and in many ways important of English local institutions.[1]

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[1] See below, p. 110.

A duty resting upon all free Englishmen of this period, and which goes back no one knows how far, is that often referred to as the *trinoda necessitas*, the threefold obligation. The first was the duty of serving in the militia, a public service which the citizen owed the state. By the later period this was, no doubt, in some degree territorialised,[2] that is, in practice, a fixed, traditional number was required from certain districts or holdings; but theoretically and in times of need it was probably still enforcible on the individual freeman. Second, was the duty of keeping in repair the nearby fortress or occasionally of building a new one; and third, the repair or building of bridges. These duties were enforced against the thegns as well as the common freemen, and very rarely was anyone exempted.

The thegns, beyond the *trinoda necessitas*, owed a variety of services or payments as a condition of their bookland, many of which seem quite private with respect to their lords, economic in character, and look like rent. But when, especially in connection with the king's thegns, we hear of equipping a warship, of guarding the king, or keeping watch on the coast, or perhaps responsibility for appearance in the militia of the accustomed quota from their district, we glimpse a substantial class of lower nobility, not notable for its privileges and exemptions, but for its public obligations.[1]

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[1] On the whole subject of the frankpledge, see W. A. Morris, *The Frankpledge System.*

[2] See above, p. 18, note 1, and below, pp. 97, 98. One man to one hide of land was supposed to be something of a norm in England.

But with the higher nobility things were different. Economic forces were bringing control of the land into fewer hands. As the kingdom grew larger and the demands upon the government greater, kings were constrained to make grants of immunity and semi-jurisdictional authority and use the strength of private individuals for public purposes. The higher nobility was coming into the possession of a dangerously large power. The old official class of ealdormen was affected by these changes. The almost inevitable medieval transformation was taking place—the local official was becoming the local potentate. This was helped on by the king whose reign is often taken as marking the highest point reached by the Anglo-Saxon central government. Edgar was confident of his own ability to control any element in the realm; and, seeing inefficiency of executive authority everywhere and having, for his time, high ideals of government, he sought by increasing the number of earls and by placing more power in their hands, to obtain his end by the easy but dangerous method of utilising private ambition and local family pride. He sowed the wind and his successors reaped the whirlwind. Under the weak

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[1] Of western Europe in general, Vinogradoff says, (*Cambridge Medieval History*, ii., 651): "The medieval view of government admitted, and indeed required, that wealth and social influence should be accompanied by political power and public functions." It is interesting to notice throughout English history how slightly these prerogatives of the nobility looked in the direction of immunity or special privilege and how markedly in the direction of public duty and responsibility.

Ethelred II., this policy resulted in a marked decentralisation; each earl regulated the affairs of his locality to suit himself, concerted action was destroyed, and a situation created that made possible the conquest of England by the Danes. Under the strong Cnute, the earls were kept under control, but the system of local powers, as established by Edgar, was not rooted out; and under Edward the Confessor a few great earls attained a power unknown before. Since the Danish invasion of Alfred's time, a racial distinction had existed between northern and southern England. This division was now intensified by coinciding roughly with the territories controlled by great families of earls. The existence of a north and south England and the final bitter jealousy between the houses of Leofric and Godwin constituted an important negative cause of the Norman Conquest. Apparently too great a strain had been placed upon the Anglo-Saxon central government; that which served in Northumbria, Mercia, or even Wessex, did not suffice for all England, especially in time of war and rapidly changing economic conditions. The central government was not in a healthy condition in the eleventh century, and perhaps England was due to pass through a further stage of feudal decentralisation when she was rescued by the extraordinary results of the Norman Conquest. But what needs especial emphasis in conclusion is that there was yet a healthy if primitive local government. It was healthy because the mass of the English population was still neither too high nor too low to be the ones to work it, and because it was the custom of the country to expect most of the governing—most of what served roughly to protect people's lives and property—to be done not by officials or even the landlords, but by the people themselves.

SECTION II

NORMAN INSTITUTIONS. 911–1066.

MINDFUL of what has been said of the two main sources, Anglo-Saxon and Norman, from which the English constitution began its growth,[1] and having now seen something of Anglo-Saxon institutions, we turn here to the Norman background. As this is, in a sense, the whole continental institutional past with roots running back to Rome and perhaps further, it is obvious that but a bit of it can be touched on here, just those parts which we find expressed in Norman institutions and which Normandy gave to England.[2]

Normandy had existed as a duchy during the tenth and eleventh centuries, just the period when the feudalism of the continent was dominant. Hence when the Viking conquerors of the lower Seine were learning the language and adopting the mode of life of the more numerous conquered population they were growing into the feudal life of northern France. They were no isolated group. They formed a vassal state of France and were acquainted with all the varying relations by which the many big and little feudatories which made up France were held together, and with the special position of one of those feudal powers that held the royal title. Moreover, the Normans did not go to England simply to reproduce their duchy there; their duke was to become king, and the Norman nobles were to become the vassals of a king, hoping to gain all the independence and power that that seemed to them to imply. The feudalism that they knew and that they brought with them was that of France, albeit with their own stamp upon it. While it is impossible to deal here with the vast subject of European feudalism, yet any account of what the Normans brought to England makes some reference to it necessary, enough at least to bring out those features which distinguished it from the feudalism which had been growing among the Anglo-Saxons.

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[1] See above, Introduction.

[2] "The institutions of the duchy of Normandy occupy a unique place in the history of Europe. They have their local interest, giving character and distinctness to an important region of France; they furnished models of orderly and centralised administration to the French kings after the conquest of the duchy by Philip Augustus; and they exerted an influence of the first importance upon the constitutional and legal development of England and the countries of English law. Normandy was thus the channel through which the stream of Frankish and feudal custom flowed to England; it was the training ground where the first Anglo-Norman king gained his experience as a ruler, and the source whence his followers drew their ideas of law and government." C. H. Haskins, *Norman Institutions*, p. vii.

1. **Continental Feudalism.**—Feudalism, in a broad sense of the word, there has been in various parts of the world and at various times; but *the* feudal system, historic feudalism, that feudalism which is usually meant when the word is used without adjective or explanation, is that which originated in France in the early middle ages and spread thence in western Europe. This feudalism differs from others in that it was based upon the fusion of certain Roman and German institutions, which, obviously, can have been exactly paralleled at no other place or time.[1] Speaking of medieval European society in general Vinogradoff has stated "that there is a continuous development

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[1] The feudal practices of one place may differ much from those of another, and the feudalism of one time from that of every other time; yet the use of the same name indicates a similarity or analogy in fundamentals that is true. All practices or states of society which have been commonly called feudal have arisen from the same general condition and to meet the same general needs. The occasion has been the same, but the local stuff in the form of previously existing ideas and institutions which the occasion has made use of and made over has, of course, always been different. For the origin of feudalism see Adams, *Civilisation during the Middle Ages*, ch. ix., and Vinogradoff in *Cambridge Medieval History*, ii., ch. xx.; for the developed feudal institutions, see Seignobos, *The Feudal Regime*, Emerton, *Medieval Europe*, ch. xiv., and Vinogradoff, in *Cambridge Medieval History*, iii., ch. xviii.

from Roman or barbaric roots, and that there is no other way to explain the course of events during our period but to trace the working of both these elements of social life."

There is no doubt that hostile frontier relations with the Roman Empire and their later invasions of that Empire occasioned among the Germanic peoples a relaxation and gradual weakening of the various kin ties which had been the most pronounced feature of their early society. Rapid movements and rapidly changing conditions blurred the kin lines. Alongside the kin groups or overlapping them appear groups or gilds of warriors organised on a basis of equality—sometimes offensive, sometimes defensive; and presently groups of young warriors gathering under the leadership of some specially notable chief who seems likely to lead them to glory and to plunder. This last group, already prominent in the time of Tacitus, is known generally by the Latin name *comitatus*. It introduced among the free warriors new notions of obedience and devotion to a chosen leader. There was honour in the relation, and mutual obligation, and strong bonds of fidelity even unto death. The chief's highest obligation was to his followers as theirs to him and there was emulation among chiefs to get the largest and best followings. On Roman soil, especially in Gaul, this German institution came in contact with a Roman institution that bore some analogy to it, that of patronage. In the dangerous times of the later Empire when the government could no longer protect its frontiers or keep order, the weaker freemen in the provinces were gathering under the patronage (*patrocinium*) of some great man in the locality who, whatever the stipulated services of the men, was thus building up at least a potential fighting force, and who perhaps had a defensible place to which to flee in time of great peril. In the centuries which followed, these two practices tended to unite, as Frankish conquerors and Gallo-Roman population united, for it was not a time of peace, and warlike groups had plenty of reason for existence. The Roman practice had more definiteness of form, of stipulation of mutual obligation, the German more of sentiment and honour. These two were the chief source in antecedent idea and practice of the later lord and vassal relation. Both related to free men, and only that aspect of feudal society which relates to free men is here being traced. It is upper-class, political feudalism, feudalism which touches the history of government, as opposed to the peasant, economic side—two aspects which are more easily distinguishable in continental than in Anglo-Saxon feudalism.

After their conquest of Gaul, the Franks became stationary, and this and contact with Roman ideas made landholding a more prominent feature in their lives. In early Frankish times, the Merovingian kings and sometimes other great men who were in a position to do so would make grants of land to their followers in reward for military or other service. Whether these grants implied further service or are to be looked upon as out and out gifts is hard to say. Their ideas of landholding were of the haziest. There was no very definite expectation certainly, perhaps a kind of moral obligation. At any rate by the early eighth century the Merovingian kings seem to have had little available land and the line had greatly declined in power. Then came the rise of the Carolingian dynasty and the Arab attack from the south. A new and more permanent fighting force, especially a cavalry to meet the Arab horsemen, must be built up and land must be the basis of it. In this emergency, Charles Martel turned to the lands of the church, lands so largely the gifts of kings and nobles in preceding generations. Some of these lands were seized outright and some granted by the churches to the king's followers at the king's command. There must be more definite stipulation of service than hitherto, and in these latter grants especially there was used a form of lease, Roman in origin, but which had undergone much change during centuries of occasional use, especially by the church. This was the Roman *precarium*, later more generally called *beneficium*. Originally a tenure wholly at the will of the grantor, it had gradually become a tenure for a term of years, then more generally for life with perhaps some expectation of inheritance. Despite these changes, however, there lasted the Roman idea that proprietorship, the superior right to the land, lay with the grantor. Thus the circumstances of the early and middle eighth century brought about a combination that was momentous in shaping feudal institutions. Grants of land were being made, but distinctly conditional grants—conditioned on military service, and that generally the new mounted service—to men most of whom already occupied the vassal relationship. This was the beginning of the union of fief and vassalage, the land side and the personal side of the later feudalism.

But this was the formal, institutional background of feudalism. The occasion for the spread of these forms and relations until they became the leading factor, public and private, in the lives of most freemen, came with the break-up of the Carolingian Empire in the ninth century. This Empire had grown to a rapid and brilliant appearance of unity and mature government as a result of the crisis of Mohammedan invasion, the chance of three generations of exceptional rulers, the last of whom was Charlemagne, and much Roman imitation. With the passing of this artificial phase, the new Europe got down to its true basis, began its true advance; and its true basis at that time was a feudal basis. Poor roads or none, lack of all means of easy intercommunication, a population of most divergent elements, without common traditions and many of them with but the thinnest veneering over their barbarism—these things meant a local outlook and a local government, in which the strong man, whether he happened to bear the title of an official or not, was sure to be the commanding factor. The newly combined institutions of vassalage and fief just fitted. The rulers of the ninth century made grants of land in reward for service as the Merovingians had done—sometimes voluntarily, but more often because they could not well help it—but now these grants took the form of the clearly conditional benefice or fief, the condition usually being military service. And other great landholders besides the king were building up military followings in the same way; subinfeudation, as we may begin to call it, became common. Naturally such grants would usually be made to those in the vassal relation to the grantor. Even Charlemagne had had difficulty in enforcing individual military service upon the freemen of his realm, and now such army as the central government could raise was through the use of this nexus of private relations. More and more men were successfully avoiding their public responsibilities by entering into a private contract with a local noble who was to be buffer and shield between them and state authority. Petty, local fighting in private quarrels became common. Military service had passed largely into private hands and, so far as it was regulated at all, it was by personal allegiances and attachments and private contracts based on grants of land.

The other state function of the time, jurisdiction, was going the same way. Already and slowly the great landholders had been acquiring a partial jurisdiction over some freemen on their estates, these freemen often through economic relations being drawn into the courts held for serfs. But rapid advances in jurisdictional scope were now being made by the great nobles. Sometimes through the so-called grant of immunity the sovereign must perforce reward some prelate or lay noble or purchase his favour by making his estate immune from the state officials and practically conferring upon him the functions of these officials. Again, a man who had been an official might, with the breakdown of the central power, keep on holding a local court, but now rather through his own power and authority than as the agent of the state, thus almost unconsciously making a public court into a private one. And perhaps oftenest of all there was out and out seizure of jurisdiction, for its revenue value and as a kind of unconscious move against the utter disorder which threatened in those times. With the army and the courts in private hands the feudalising process had gone far.

A change that was well along before the collapse of the Carolingian Empire and which was doubtless going on with greater speed during that time was the passing of the middle class, the common freemen, as an element that really counted in society. The settling down of the Germanic tribes of free warriors to a life in which the forms and conditions of landholding were the most important economic factor, the economic pressure of a denser population, the continuation of wars on every hand, and the passing of an effective central power were the causes. Western Europe was fast giving shape to the well-known medieval formula of a praying class, a fighting class, and a working class—the three estates of clergy, lay nobles, and peasantry. Of these, the peasantry was, of course, vastly the most numerous. In it there were few slaves, for the life of the time did not call for many menial, personal servants; it was an agricultural life in which land-tenure counted everywhere; the peasantry were the half-free cultivators of the soil, attached to the soil; they were predial serfs.

It is important to compare carefully the continental movement just sketched with the rise of Anglo-Saxon feudalism, and it will be found that they are parallel movements at many points. But the differences are striking. The Anglo-Saxon kingdom never reached the degree of disintegration which the Frankish kingdom suffered: public functions had not so fully passed into private hands and were not so identified with landholding. The middle class in the more peaceful England had not so nearly disappeared; vague as were the boundaries of status, there were still enough whom we may safely call common freemen to count as an important element in the state. Anglo-Saxon feudal institutions also lacked a certain legal definableness which came on the continent from a Roman institutional background. And in Anglo-

Saxon feudalism, while the economic side is much the more important, it is impossible to distinguish so clearly between the political and economic aspects. The distinguishing traits of the political feudalism, found in Normandy as elsewhere in France in the eleventh century, and which was brought into England by the Norman Conquest, may be summarised. They related to a part of society held together by a nexus of private contracts. The relation of lord and vassal, whatever was the expectation based upon inheritance of the fief, was in theory and usually in practice, wholly voluntary, freely entered into on both sides, and solemnised by the ceremony of homage. It involved such negative duties on the part of the vassal as not to attack his lord, reveal his secret, endanger his castle, diminish his judicial power, or hinder any of his undertakings; and positively to render him counsel and aid, usually in the form of attending his feudal court, and of course, as the main condition upon which the fief was held, a fixed yearly amount of military service.[1] The obligations of the lord, protection, backing, and a like personal fidelity, while not so easy to particularise, were equally binding. As between lord and vassal, the better right to the fief was with the lord, evidenced by the reversion of the fief to the lord at the vassal's death and the payment of *relief* when taken up by the new vassal. We hear little of best right, of ownership; in land tenure all was relative, not absolute; all up and down the scale, everybody held land *of* some one. Attached to this nexus of private contracts based on landholding were public duties—the chief ones of those times, the levying of a military force and the holding of courts of law. The amount of jurisdictional power possessed by the different grades of nobles varied greatly, but public courts, as such, whether central or local, had practically disappeared. Criminal jurisdiction, especially in the more serious cases, was supposed to have come only by royal grant or usurpation and was generally possessed only by the great nobles. There was no system of appeal. If judgment defaulted the case might be carried to the lord's lord; but a judgment by one's fellow vassals, by one's peers, was final unless an appeal of false judgment were made to God and a man fought his peers singly or *en masse*. At the top of this feudal society was the king in a curious double position. Feudalism had taken possession of him; he was lord of lords, suzerain, at the apex of the feudal hierarchy. But there was a trace of the old sovereign left about him—a dim theory of paramountcy, power, and right that denied the whole feudal scheme and which would destroy it if in process of time and circumstance it ever fell out that the king got power enough to begin to unravel the feudal tangle. Any short account of feudalism is bound to give an impression of regularity or completeness which is untrue. It would be impossible to overstate the confusion of the feudal relations: vassals holding often of many lords with the problem of conflicting allegiances, great nobles holding from lesser nobles, cross relations of every sort, remnants of older forms of landholding and of an older society in general, and now and again foregleams of a new order towards which things were working. Long before feudalism was mature or a system it had begun to die.[1]

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[1] The service might be some other than knight service provided it were such as a noble could perform without tarnishing his nobility, but knight service was so much the rule that the other forms were negligible.

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[1] The common use of the word *system* in connection with *feudal* has been abundantly productive of misconception. No one at the time or for centuries after thought of there being any such thing as a feudal system. Different men could do different things, had different rights and liberties which they tried to understand and enforce; there were considerations of honour and personal attachment; there were local conditions and peculiarities. And men did not look much or know much beyond the locality. Maitland has wittily pointed out that, as far as England is concerned, the feudal system was introduced by Sir Henry Spelman (1562–1641). "Now were an examiner to ask who introduced the feudal system into England? One very good answer, if properly explained, would be Henry Spelman, and if there followed the question, what was the feudal system? a good answer to that would be, an early essay in comparative jurisprudence. . . . If my examiner went on with his questions and asked me, when did the feudal system attain its most perfect development? I should answer, about the middle of the last century." Maitland was writing in the nineteenth. "Coke [a contemporary of Spelman's] in his voluminous works has summed up for us the law of the later Middle Ages, but in all

But such as it was it was the main thing in life when the Normans conquered England.

2. **Normandy on the Eve of the Conquest.**—The circumstances of Normandy's origin and her uniformly able and masterful dukes had given her an independence and power possessed by no other part of France north of the Loire river. In all that related to central administration, Normandy early outstripped her neighbours such as Anjou, Flanders, and the domains of the king of France. But detailed knowledge of Norman institutions before the time of the Conqueror himself is very slight. We know something of what may be called the external history of the duchy, of its relations to the French kings and other neighbouring powers, and of its general reputation and characteristics. But Normandy possessed not a vestige of written law at this time, and there has remained little evidence of any sort that throws light upon its internal organisation.[1] It has been remarked of Normandy, after her Scandinavian founders had absorbed the French civilisation of the people whom they ruled and with whom they were coalescing, that Normandy was French, but French *with a difference*. This was certainly true of Norman feudalism. Before the Conqueror was born there was feudal tenure, and probably also an assessment of

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his books, unless I am mistaken, there is no word about the feudal system. . . . Spelman reading continental books saw that English law, for all its insularity, was a member of a great European family, a family between all members of which there are strong family likenesses." He worked out the idea of a common feudal law, a feudal system. "The new learning was propagated among English lawyers by Sir Martin Wright; it was popularised and made orthodox by Blackstone." Maitland, *C. H. E.*, p. 142.

[1] Our knowledge of Norman government has in recent years been greatly enriched by the studies of Professor Haskins, published under the title *Norman Institutions.* But most of this book relates to the twelfth century. Of the earlier period, Professor Haskins asserts that the earliest trustworthy information respecting the government of Normandy falls in the lifetime of the Conqueror and much of it is gleaned from that later part after the battle of Hastings. In chapter i. is to be found the first comprehensive account of the government of Normandy in the time of William the Conqueror, and to this chapter there is constant indebtedness in the present sketch. The brief account of Norman institutions in P. and M. i., book i., ch. iii., is still of great value. See also Haskins's more general and popular book, *The Normans in European History.*

military service in some way proportioned to the fiefs; there had also been grants of jurisdiction by the dukes. But our fuller knowledge of Norman feudalism and of its special traits comes from the Conqueror's time. Norman efficiency in organisation had, before 1066, fixed the knights' services due from the great nobles to the duke in units and multiples of five, these were being subdivided among these great lords' vassals, and the specific holdings which owed them were known as knights' fees. There was in this a definiteness and orderliness not found elsewhere. While thus organising the feudal force of knights, the dukes do not seem to have relinquished the right to call out all freemen, at least for defensive warfare. This made them quite sure to recognise and maintain the Anglo-Saxon militia duty, the *fyrd*, after the Conquest. While it cannot be asserted that all free tenures were, by 1066, of the feudal type, surely they were rapidly approaching it. But while all feudal forms were spreading, there was no approach to the private warfare and general license which the feudal state of society usually meant. One special guarantee against private war which was an established policy was that castles—the very life of feudalism—could be built only by the duke's permission and must be turned over to him whenever requested. Of private jurisdiction little more can be said than that it existed as elsewhere in France, except that more high criminal jurisdiction was reserved for himself by the duke and when exercised by others it was specifically on the basis of a ducal grant. Certainly in the localities there remained some public courts where justice was administered on the duke's authority. The duke's own central court, his *curia*, was, like the feudal courts in general, a counselling body and a court of law; it "was brought together for purposes of counsel on matters which ranged from a transfer of relics to the invasion of England, and for judicial purposes."[1] Its make-up was somewhat shifting. Usually there would be present members of the duke's family,

[1] Haskins, *Norman Institutions*, p. 55.

bishops, counts, some other great nobles, the household officers, and some local officials, the *vicomtes*. A large number of these would normally be the duke's vassals, but it is hard to say whether or not it would yet be the truest characterisation of it to call it the duke's feudal court.[1] In general, "the organisation of Norman society is feudal, with the accompaniments of feudal tenure of land, feudal military organisation, and private justice, but it is a feudalism which is held in check by a strong ducal power."[2]

Of other matters of government there is not much to be said. The duke's fiscal system was particularly well organised, distinctly in advance of the surrounding feudal states. The rents from his lands, court fines, forfeitures, feudal dues, tolls and other rights in markets and fairs, salt works, fishing rights, and profits of coinage (to mention the more regular and important) furnished a large income. In the accounting of this revenue a distinction was made between what was regular and what was extraordinary or occasional, it was collected with much care and system from administrative districts, the *vicomtés*, and ducal grants of money were charged against receipts in general from a district and not, as was the more primitive practice of the French kings, against an individual domain or specific source of revenue. Such signs of fiscal maturity we are not surprised to find early in the reign of the man who, just before his death, conceived and carried out the Domesday Survey.[3] Over the *vicomté*, which was an administrative district of considerable extent and which had largely replaced the earlier hundred and *pagus*, was the *vicomte*, a distinctly public official. He collected the revenue, lead such military forces and administered such justice in the locality as were not in private hands, and was the duke's general executive agent. While there was some tendency in the office to become hereditary, the dukes were always strong enough to keep the *vicomte* an official.[1] There must have been forest officials, for the forests, that is, the districts reserved for the duke's hunting, were extensive. There were forest pleas, and offences committed in the forest and breaches of the forest law seem to have been punished with special severity. In all Norman courts crime was probably dealt with more rigorously than in England; there was more corporal punishment and less composition by fine. Also the Truce of God,[2] introduced early in the Conqueror's reign, existed in Normandy for the same reason that it did elsewhere on the continent, the mitigation of private warfare; but the stern rule of the dukes made it less necessary than in most other places. Yet William favoured it, for it worked with his own policy, the maintenance of public order.

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[1] "What we know is that when the time for the conquest of England is approaching, the duke consults or professes to consult the great men of his realm, lay and spiritual, the *optimates*, the *proceres* of Normandy. He holds a court; we dare hardly as yet call it a court of his tenants-in-chief; but it is an assembly of the great men, and the great men are his vassals."—P. and M. i., 73.

[2] Haskins, *op. cit.*, p. 60.

[3] As to whether the English Exchequer in any sense grew out of this Norman fiscal system, see *ibid.*, p. 40 ff.

The church in Normandy, in the separation of its organisation from that of the state and in its close relations with Rome, differed from the Anglo-Saxon church as the whole continental church did. Yet there were some special conditions in the Norman church. It embodied in a marked degree the great reform movement that had begun at Cluny and the monastery of Bec was a sort of northwestern outpost of Cluniac influence. But while there was much in the general Cluniac movement which tended to make the church the rival or superior of the state, this side was rigidly suppressed by the dukes in Normandy. As it

[1] There were surely resemblances between the Norman *vicomte* and the Anglo-Saxon sheriff. Haskins remarks, "Whether the Norman *vicecomes* contributed anything more than his name to the Anglo-Saxon sheriff, is a question to which no satisfactory answer can be given until we know more of the functions of both officials." *Norman Institutions*, p. 46. *Vicecomes* was the word used after the Conquest to translate *sheriff* into Latin. It was the Latin word for *vicomte*.

[2] The church attempted to make the period from Thursday night to Monday morning one in which there should be no fighting, a time of truce. This part of the week was chosen in remembrance of Christ's sufferings and resurrection

purified and enriched the life of the church the movement was welcomed, but the duke parted with no whit of his control. He appointed the bishops and abbots, and could, upon occasion, depose them; he attended church councils and sanctioned their decrees; the monasteries were under his special protection and control; and no great churchmen were allowed to usurp in any district the functions which the duke kept in the hands of his own local officials, the *vicomtes*. As to the status of the church courts and the extent of ecclesiastical jurisdiction, the evidence is so scanty and confusing that it is hard to formulate a generalisation. But they clearly occupied a much more important place than anything in the nature of church courts among the Anglo-Saxons,[1] and all the evidence points towards Norman practice being the background of William's famous ordinance separating the spiritual and temporal courts in England after the Conquest.[2] For the pope the duke had always a pious deference and respect, without sacrificing a vestige of authority.

In conclusion it is particularly important to notice that the peasantry was in a better condition than elsewhere in northern France. There had been a peasant revolt in Normandy in 996, a very early time for such a movement; and while contemporary evidence tells only of its quick and cruel suppression by Duke Richard II., it may have had some good results. The fact of the revolt itself indicates a peasantry in no abject condition. At the time of the Conquest, there was practically no personal servitude in Normandy, no slaves; and many of the peasants had rights that would justify us in reckoning them as freemen. After the eleventh century, there was "no trace of serfdom or the freeing of serfs, and the free position of its farming class[3] distinguished the duchy from most of the lands of northern France."[4] We have no means of knowing whether these people had had public duties and responsibilities at all comparable with those of the corresponding class in England;[1] but England was conquered by a people who surely had no traditions of a degraded and downtrodden peasantry.

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[1] See above, pp. 61, 62. [2] See below, p. 131.

[3] Aside from the fighters and the churchmen, there was little but a farming class; at the time of the Conquest Normandy had little or nothing to bring to England in the way of municipal institutions.

[4] Haskins, *The Normans in European History*, p. 157.

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[1] See above, pp. 66–69.

PART II

The Norman Conquest—Its More Immediate Results

1066–1100

INTRODUCTORY STATEMENT

THE Norman Conquest, considered from any point of view, is a difficult subject. Institutionally considered, it is, perhaps, especially so. The first difficulty lies in the vagueness and intricacy of the institutions of both Anglo-Saxons and Normans, but there were in the Conquest itself many sources of institutional influence and development. The time and circumstances of the undertaking and the personalities and doings of the Conqueror and his chief followers, as well as of his sons have to be taken carefully into account. At a time when there was little that was hard and fast about institutions and when the upheaval of an invasion gave opportunity for change, small things could mightily affect the future. It is, of course, out of place here to give a narrative account of what took place. It is the purpose rather to examine the conditions of government and society after the Conquest had wrought its first great change. It is not easy to determine at just what point to make this survey since the Conquest so profoundly affected all later English history. However, as stated in the Introduction, it seems truest to fact to regard the reigns of the first two Norman kings as the time of immediate results. In the reign of Henry I. are clearly seen the beginnings of new and permanent institutional forms, especially as related to the central government; hence this reign, notwithstanding the formidable hiatus of the anarchy under Stephen, has been connected with the later rather than the earlier period. We shall, therefore, be mainly concerned here with the latter part of the Conqueror's reign and with the reign of William II.; but the consideration of some matters will make it necessary to trespass occasionally upon a later time.

SECTION I

CLASSES OF MEN AND THE INTRODUCTION OF FEUDALISM

IT was no purpose of the Conqueror to make changes in English law and custom beyond what were necessary to a powerful and effective monarchy. He intended to rule in the fullest sense of the word, but he had no pettiness of purpose which would lead him to make arbitrary changes for the mere pleasure of lording it over a conquered people. Moreover, he had no idea that it was necessary to make any general substitution of Norman or French institutions for Anglo-Saxon. He was to rule as an English king, and he believed that there were many good features in the English system, and, doubtless, felt the expediency of leaving undisturbed many things, which, while they had nothing in particular to recommend them, might occasion discontent and heart-burning in the removal. This, as nearly as it can be interpreted, was the Conqueror's initial attitude; but as years passed, more change and severity were necessary than he at first supposed, and many things came to pass that could not have been foreseen.

In violent and sudden changes, the lower classes of men and the smaller local institutions are the ones least affected at first. We have reason to believe that, in the early years after the Conquest, the Anglo-Saxon serf, villein, and *sokeman* lived on, very little disturbed in their relative positions. The large tenures, those of their lords or lords' lords, might be changing hands and changing in character very fast without immediately affecting them. But a change did reach them, at just what time it is impossible to say, the beginning of which must be noticed here. The status of the lower classes, that strange complexity of nomenclature and condition where freedom faded imperceptibly into unfreedom, was beyond the comprehension of the new Norman lords of the soil. Perhaps they did not feel that it was worth while to try to comprehend it, or they may have been largely unconscious of it. Vague as were many things in continental status, the line between the servile classes and those above them was usually quite distinct. Moreover, when the Norman mind acted freely, it was likely to produce what was clear-cut; and the Norman lawyers of the twelfth century had many of the principles of the Roman law to help them. A process began in England, which, in the course of time, drew a tolerably clear line between freedom and unfreedom. The large, confused Anglo-Saxon class was being cut in two; a part, and that probably much the smaller, was to pass into a better recognised condition of freedom, while more were to become, by a gradual depression, a part of the servile class. The process was not complete for a century or more after the time we are now considering, but it is possible at this point to see the beginnings of future well-known classes, whose character fundamentally affected English government. The unfree class came to be known after the Conquest as the villein class, and was made up of the pre-Conquest serfs whose status had been raised, and the pre-Conquest villeins whose status had been lowered. It was much larger than the servile class before the Conquest, but not so abjectly servile.

That this simplifying process greatly improved the legal position of the serf can hardly be doubted. We need not indeed suppose that the *theow* or servus of earlier times had been subjected to a rigorously consistent conception of slavery. Still in the main he had been rightless, a chattel;

> and we may be sure that his rightlessness had not been the merely relative rightlessness of later days, free against all but his lord. Indeed we may say that in the course of the twelfth century slavery was abolished. That on the other hand the villani suffered in the process is very likely. Certainly they suffered in name. A few of them, notably those on the king's manors may have fallen on the right side of the Roman dilemma "aut liberi aut servi," and as free men holding by unfree tenure may have become even more distinctly free than they were before; but most of them fell on the wrong side; they got a bad name, and were brought within the range of maxims which described the English *theow* or the Roman slave. Probably we ought not to impute to the lawyers of this age any conscious desire to raise the serf or to debase the villein. The great motive force which directs their doings in this as in other instances is a desire for the utmost generality and simplicity. . . . They reck little of the interests of any classes, high or low; but the interests of the state, of peace and order and royal justice are ever before them.[1]

The class, thus formed, had the peculiarity of a distinctly servile side and a distinctly free side. The former was shown in their relations to their lords, in which were present the usual servile disabilities. The villein whose daughter married outside the manor or who married a freeholder inside the manor must pay the *merchet*, or marrying fine for loss of a worker, to his lord; and the latter had many petty and vexatious rights over the property of his villein, which proves, however, that the villein did have personal property that was recognised as his. The villein was bound to the soil and to certain services, payments in labour and in kind, which were determined by the custom of the manor and which varied in their amount and certainty in individual cases. To his land and to his services, the villein could be strictly held; if he fled, his lord had the right to bring him back by force. On the other hand, to all persons except his lord, the villein presented his free side; as against them, his right to have his property and personal safety protected was practically the same as that of the freeholder upon the same manor. As the system of king's courts developed, its attitude towards the villein became a matter of great importance as affecting his status. In a word, and by way of anticipation, it may be stated here that the villein, by the early thirteenth century, stood on a practical equality with the freeman in a royal court in all matters relating to its criminal jurisdiction. But it was not for him a civil court; he could bring no action there.[1]

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[1] P. and M. i., 430, 431. For the depressing effect of post-Conquest taxation upon the middle classes, see below, p. 120.

The men above the villeins, the non-noble freemen, are known usually as freeholders. As the mass of Anglo-Saxon tenures became somewhat simplified after the Conquest, this class held normally by one of the socage tenures, tenure in free socage, the ancestor of the modern freehold, being the most important.[2] Most manors contained a number of freeholders in addition to its villein tenants; but a freeholder might have a manor with freehold and villein tenants of his own. The services of the freeholder were much the same as those of the villein, but possessed a kind of definiteness that left him who rendered them less at his lord's disposal. The freeholder lacked also the ascription to the soil and the more personal incidents of servitude. But any general description is likely to make the distinction between the freehold and villein classes appear clearer than it actually was. The more the investigator deals with details, the more difficult he finds it to obtain a sure touchstone of demarcation; even such servile marks as the payment of the *merchet* become vague and unsatisfactory as guides. What at first seems a less clear-cut test, definiteness of service, has been found, in the long run, the best. It is true that the villein's service was often fixed as to its sum total, but he did not know from day to day what his lord would have him do; he was at his lord's disposal.

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[1] See below, pp. 194, 195.

[2] See above, p. 32 and note 1. After the Conquest, free socage was more widely used and often by people of higher rank than in Anglo-Saxon times. See Maitland, *Domesday Book and Beyond*, pp. 66 ff. This tenure was commonly known as *fee farm* from the Conquest to Edward I.

A matter which greatly complicated the relations of all classes was what has been termed the divorce of tenure and personal status. At a time when ideas of land ownership were very vague and several individuals of different status ordinarily had rights in the same piece of land at the same time, the services from the individual holdings did not change as the tenants changed. Land was stable and services traditional, and the medieval habit of looking at the land rather than the shifting and changing individual brought it about that the unit holdings became identified with certain services whoever the tenants might be: they always owed villein services or they always owed freehold services.[1]

> . . . service due from each particular piece of land came to be everything and the actual status of the holder of the land a matter of comparative indifference. It is scarcely possible to overrate the effect of this manner of holding land in breaking up the social system of the middle ages. Great nobles thought it no degradation to hold land on socage tenure of mesne lords far below them in the social scale, or even to undertake the more precarious liabilities of the unfree villein holder.[2]

In general, there seems to have been no limit to the number of different tenures (except the number in existence) by which the same individual might at once hold different pieces of land. Where there was divergence between tenure and status, it was usually the man of higher status holding the lower tenure, and the ordinary freeman might be in danger of losing his free status by too long identification with villein tenure. But notwithstanding the various sources of confusion among classes, a great body of the unfree, the tenants in villeinage, stands out clearly enough from the freemen; and of the latter, there was a large class of holders by socage tenure, the personal status of most of whom was non-noble and free. The existence after the Conquest, of a substantial non-noble free class was a very important factor in later governmental development.[1]

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[1] Of course these unit holdings were bundled together in the fiefs, great or small, held by nobles, on the basis of feudal service, from other nobles or from the king. On the king's manors or in his boroughs land owing freehold or villein service would be held directly of him. Besides freehold or villein service, the service or tenure in frankalmoin, a church tenure, could stamp and identify a piece of land. See below, p. 101, note 1.

[2] Medley, *English Constitutional History*, p. 39.

In turning to the consideration of the nobility, we come upon an immediate and all-important result of the Conquest. Owing to the initial resistance at Hastings, which the Conqueror was pleased to consider treasonable, there was an extensive confiscation of land in the south. The long resistance in the midlands and north brought equally sweeping confiscations there. Hence almost all the land in England either changed hands or was regranted on new terms to the old holders. It was through this process that the principles of continental feudalism entered England. The land was granted upon feudal terms by no special design, but because the Conqueror was acquainted with no other. It was now held *of* the king, that is, the better right lay with him and not with the grantee, and it was held by definite contract for some honourable service, ordinarily military service. Then the men who held directly of the king, his tenants-in-chief, might make subgrants of land to others, who would hold of them upon the same conditions. But this did not touch the lower tenures. When new grants were made to nobles, they were invariably feudal, but the lower holdings within these grants remained as before. However, the feudal principle that all land must be held *of* some one began to affect the non-feudal tenures. The socage tenures, while remaining throughout their later history unchanged in essentials, acquired after the Conquest a feudal tinge that gave them for a time a somewhat anomalous character.[1]

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[1] See below, Part III., § II., 4, *passim*, and Part III., § III., 2.

The unit of military service was that of the single knight, the warrior fully armed according to medieval fashion. Hence the unit of military tenure was a holding of such value as to support a knight. When the new feudal tenures were created, they were reckoned in terms of knights' services. The Conqueror might grant to one of his followers an extent of territory from which forty knights were required, to another, a holding furnishing twenty or thirty knights, and so on. The number of knights' services were almost always reckoned in multiples of five, as they had been in Normandy. Although there was, of course, a relation between the amount of land granted and the number of knights required from it, yet no very accurate measuring unit seems to have been used; the Conqueror probably fixed the numbers quite arbitrarily. In many cases, surely, the number of knights required was much below what the land might have furnished. Comparatively few tenants-in-chief owed over fifty or sixty knights, and the sum of all was about five thousand. It has been contended by some writers that this system of knight service was simply a continuation, under another name, of what is often called the *thegnage* of Anglo-Saxon times. There was, however, an essential difference, which is an illustration of the fact, already discussed, that England before the Conquest did not possess the principles of continental feudalism. What had been growing in England was a more or less complete territorialising of military service. The old militia idea that every freeman could be called upon to render military service to the state no longer existed in its purity; the obligation had been shifting from the individual to the land. A certain amount of service had, for long, been rendered from a certain extent of territory; hence, except in cases of great emergency, just so many men and no more were required from it.[1] It is, moreover, likely that the large landholders were, to some extent, held responsible for the number of men their lands were to furnish. But this practice was growing, as we have seen so much else in the Anglo-Saxon system, without any principle on which to base the facts; indeed, the facts were so varied as to square with no principle whatever. They had broken away from an old principle, but had not yet reached uniformity enough to give rise to a new one; there had not been in England, as on the continent, useful ideas derived from an older civilisation that might serve as hints and guiding forces in the yet complex and imperfect facts. The thing that had been lacking and that came in at the Conquest was the idea of a definite contract as existing between lord and man. In the grants made by the Conqueror to his followers or to the restored and pardoned Saxon nobles, such contracts were made, and the land was recognised as coming from him and a superior right as remaining with him. This system of knight service remained for a considerable time the chief means of recruiting an army. The Norman kings, however, did not abandon the old right of the Anglo-Saxon kings to enforce a general levy of all freemen in case of great necessity—Norman custom, as already shown, made this natural[2]—and in the survival of this right the military system of England differed from that of the continent, where, in most places, military service had been more completely feudalised.

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[1] This feudal tinge appears in the universality with which these lands were held of some lord, all rendered some kind of service, and all tended to assume some of the more characteristic feudal dues, such as the regular aids and the relief: another feudal trait, more slowly acquired but very important, was primogeniture (see below, p. 349). But they lacked the essential feudal characteristic of being held by an *honourable* service, that is, political, the kind of service to be performed by a noble. Free socage tenure became increasingly popular, being a free tenure, with a definite, non-military service and usually lacking the more vexatious feudal incidents, as wardship and marriage. Burgage, the characteristic tenure in boroughs, was a sort of "town socage."

It has been often represented that, when William brought feudalism into England, he consciously modified it in several ways in the interest of his own power. But

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[1] See above, pp. 69, 70.

[2] *Ibid.*, p. 82.

William could have had no thought of introducing a "system" that was to be modified. And, furthermore, several things, necessarily resulting from the Conquest, had an effect upon the feudal holdings and made them differ somewhat from the continental type.[1] Most prominent was the scattering of the large fiefs, which has been ascribed to a deliberate plan of William to make it diffcult for his great nobles to concentrate their forces. But it was an inevitable result of the piecemeal conquest of the country; William conquered first the south-east and, shortly after, the south-west, and must hasten to reward his clamorous followers in those regions; then came the series of uprisings in the north, the confiscation of most of the land, and the consequent new grants there; and, last of all, the country about Chester and the Welsh border was subdued, and many of the Norman nobles, who had begun to get their allotments in the south-east four or five years before, received their final holdings in the regions last conquered. Moreoever, when a Norman was, in any part of England, put into the place of a rebellious Saxon lord, he was likely to find the lands of his predecessor very irregular and scattered; for the majority of the Anglo-Saxon nobles had never gone far in rounding out their holdings.

A second effect of the Conquest was a sharper defining of feudal obligation and incident. This resulted from the rapid creation of so many new holdings. On the continent, where the feudal landholding had grown step by step through centuries, all sorts of anomalies and relics of earlier forms of tenure remained; in conquered England, where things were being made over new and the king was strong, there was a tendency to push the feudal theory where it might help the king, and work out details. In the reign of William II., there was a deliberate attempt to exploit the feudal relations in the interest of the king, which resulted in elaborating and defining the feudal obligations. Erelong, as far as feudal law was concerned, especially feudal land-law, England was leading Europe. It may be remarked in conclusion that the Salisbury oath, which is likely to strike one as a marked assumption of power upon the Conqueror's part, was not a new kind of oath. There is evidence that such an oath had been required at other times during his reign, and he and his ancestors seem to have habitually required the same in Normandy. It established in England the important principle that every man's oath to his lord was taken saving his allegiance to his king.[1]

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[1] These differences progressed with time, but never to a point that obscured the fact that post-Conquest feudalism was institutionally derived from the continent. As a matter of nomenclature and to avoid confusion, it may be useful to call the feudalism in England before the Conquest *Anglo-Saxon feudalism*, that which William brought in *continental feudalism*, and that which developed from it in England after the Conquest *English feudalism.*

In this account of the classes of men and the introduction of feudalism, the three leading land tenures of post-Conquest England are presented, those whose leading traits were to remain unchanged for about three centuries. Land tenure was now determining status more than status land tenure; it is possible to speak of rights in land, to find the better or possibly the best right, but out-and-out ownership is an idea not appropriate to the time—everybody held land *of* somebody for some kind of service, even the king sometimes being spoken of as holding it *of* God; and much in the way of public duty or function is exacted on the basis of land holding. For these reasons a subject which seems one of propriety rights cannot be left wholly to the field of private law or to economic history. It is "impossible to speak of our medieval constitution except in terms of our medieval land law."[2] For the purpose of summary and in connection with the foregoing discussion, the following diagram presents the three tenures from the three points of view of the purpose they served in society, the tenants who normally held them, and the chief services paid—each of these three points of view reflecting the same fundamental idea of the tenure.

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[1] Though William I. did not consciously modify feudalism, it must not be supposed that he was neglectful of his own interests; but he cared for these in an eleventh century manner and not in the manner which some modern writers have ascribed to him. See below, pp. 114-116.

[2] Maitland, *C. H. E.*, p. 24.

- England's Medieval Land-tenures[1]
  - Feudal (Knight's Service)
    - Purpose—Political
    - Tenants—Nobles
    - Service—Honourable (usually military)
  - Freehold
    - Purpose—Mainly economic (some feudal tinge)
    - Tenants—Non-noble freemen
      - On manors
      - In boroughs
    - Service—Kind, labor, money—relatively definite
  - Villein (Servile)
    - Purpose—Wholly economic
    - Tenants—Villeins
    - Service—Labor, kind, money—relatively indefinite

[1] Besides these three tenures there were two others, less important, as England's medieval tenures are usually reckoned: serjeanty and frankalmoin. The tenant in serjeanty ordinarily held some kind of office for his land: honourable or exalted as in most of the grand serjeanties, more petty or menial in the petty serjeanties. But there was nothing servile about any of them; they were "free servantships." Though it is impossible to draw a clear line between them, there is a general truth in regarding grand serjeanty as a variety of feudal tenure, and petty serjeanty as a variety of freehold. Frankalmoin was a distinct variety of tenure, the tenure by which the church held some of its land. Given to the church for pious purposes, this land was exempted from ordinary secular services, and the church owed for it a rather vague obligation, in prayers or otherwise, in behalf of the donor's soul. For a discussion of these tenures, see P. and M. i., pp. 240–251, 282–290.

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SECTION II

THE LOCAL GOVERNMENT

1. **The Courts—Communal and Manorial.**—The Anglo-Saxon local judicial system remained for some time after the Conquest little changed. Its usefulness was probably recognised by the new king, who certainly had nothing better to put in its place, but who had maintained some kind of local public courts in Normandy.[1] The private jurisdictions, which have been noted as seriously cutting into the hundred courts, were now, in most cases, the jurisdictions of Norman instead of Saxon lords. But notwithstanding the substantial continuance of the old system, certain important changes did begin and certain new conceptions inevitably arose in the early Norman period.[2]

The possibility that already in the Anglo-Saxon period the reeve and four men of manor or vill had, upon occasion, gone as representatives to hundred and shire courts has been discussed.[3] Whether or not they did then, they certainly did in the early Norman period whenever the non-freeholding element on the manor was not represented by the lord or his steward. The idea back of this practice is very obscure, and the function of these representatives, at least in this early period, equally so;[4]

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[1] See above, p. 82.

[2] These are briefly outlined here, and this consideration will serve as a starting point for the consecutive study of the creation of the English judicial system in Part III., § I.

[3] See above, p. 66, note 1.

[4] The reeve and four men would ordinarily be villeins, and it is clear that they were not regarded as suitors, that is, could not act as judges in the courts. As to their connection with the frankpledge and later jury system, see below, pp. 150, 151, 181.

but the entry for the first time of a clearly representative principle into any part of the English polity is a matter of importance. It is curious that it should have been at the very bottom, in the realm of the unfree. As to freemen, the duty of attending the shire court became more and more attached to certain holdings of land.[1] This change was of slow and obscure growth and resulted in many anomalies. The largest holdings did not always owe suit of court, and the actual make-up of the court under this system must have been a curious jumble of high and low, rich and poor. Soon after the Conquest, the earl and the bishop ceased to attend the court, leaving the sheriff as the only presiding or constituting officer—a change that was to affect fundamentally the court's future history. In view of the character of the Norman *vicomte*, the sheriff would be a familiar kind of official to the Conqueror, but it is clear that it was the Anglo-Saxon sheriff and not the *vicomte* that we have in England after the Conquest. Earl began to be a title of nobility instead of signifying an office. This naturally resulted from conditions in Normandy where the control of the dukes had been so complete that no great official power, or great power of any sort, had been allowed in the hands of a local nobility; the counts, who in some respects had corresponded to the Anglo-Saxon earls, were few in number, practically confined to the ducal family, and with no such relation to a local court as that held by the earls. The day of the earls either as great officials or as king-defying nobles was past. The bishop withdrew from the shire court as a result of William's separation of ecclesiastical from lay jurisdiction.[2] The court met, as formerly, twice a year, but it could be summoned oftener by the king when he had any special business that he wished it to transact. The time of meeting and the make-up of the regular hundred court[1] underwent no change in the early Norman period; by that time it was held either by the sheriff or by some deputy directly responsible to him.

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[1] Maitland, *The Suitors of the County Court*, English Historical Review, iii., 417–421. The territorialising of suit of court probably began in the Anglo-Saxon period, but this has not been proved. See above, pp. 17, 18 and note 1.

[2] See below, p. 131.

In the reign of William II., the holding of the hundred and shire courts fell into irregularity and abuse. To some extent, the king was manipulating them in his own interest through his officer, the sheriff; but undoubtedly the chief abuse was by the sheriff himself. The courts were summoned capriciously, and unusual or extortionate fines were levied. This would have been impossible in the Anglo-Saxon period when bishop and earl sat with the sheriff and the popular character of the courts was safeguarded by this balance of officials. Henry I., early in his reign, ordered that these courts be held as they had been before the Conquest, thus correcting the sheriffs' abuses of his brother's time.[2] This was but a small part of what Henry did. As has been remarked, his reign opened the great period of constitution making, and, more particularly, the twelfth-century judicial development. The later fortunes of these ancient courts will be considered in that connection.[3]

As to private jurisdiction Anglo-Saxon and continental ideas and practice ran readily together. At the bottom, manorial jurisdiction continued, as described above, and spread as the manorial system of agriculture became more universal. Private jurisdiction over freemen, criminal as well as civil, the thing which had started in England in bookland grants of jurisdictional rights in whole hundreds or parts of hundreds, also continued and grew. With the incoming of continental feudalism there was probably less confusion of thought here than before; such courts were no longer regarded as hundred courts or parts of hundred courts with changed presiding officers. Jurisdiction over freemen in private hands was a part of the regular order of things on the continent, and thought of as such. It was natural that a vigorous central power, such as there was in England after the Conquest, should assume that all such power in private hands had passed there by royal grant, was strictly franchisal, and hence could be taken back whenever the king saw fit. Historically such a theory was partly, but not wholly, true.[1] We do not know that the Conqueror or his early successors ever formulated it, but Norman conditions especially seem to bear it out; and in England the lavish judicial grants which the Norman rulers occasionally made certainly implied that they had a good deal to give; and where they found anyone exercising a jurisdiction so great as to be prejudicial to themselves, they were fertile in practical means to limit it. But there came a time when an English king set himself to theorise on the subject, and it will be useful, in that connection, to have in mind the historical background.[2] It is possible in this period of developed feudalism to distinguish a third type of private jurisdiction. A lord who had vassals, that is, men who held from him on feudal tenure, had a jurisdiction over them which included all matters relating to the law of fiefs, the strictly feudal law. This was a civil jurisdiction, and of course was never acquired or supposed to have been acquired by royal grant.

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[1] On the specially full meetings of the hundred court in Henry I.'s time, meetings that were really becoming king's courts, see below, p. 181.

[2] Henry had no intention to restore the earl and bishop to their pre-Conquest position in the court.

[3] The borough courts are mentioned below in the division on boroughs, pp. 111, 186, 187 and note 1.

One great cause of confusion in connection with these varieties of private jurisdiction is that the jurisdiction in origin and principle was one thing and the court, the physical thing of time and place, in which it was administered, might be quite another. The scattering of the fiefs, already described as a result of the Conquest, made it hard for many of the great lords to hold courts for their feudal vassals; they were too widely scattered. Such courts were occasionally held, and in them would be administered the feudal law of fiefs and also such degree of criminal jurisdiction as the lord might possess over his vassals. But such strictly feudal courts were never prominent in England and, as will be shown, ended early. When such courts existed it was characteristic of them to have no regular time or place of meeting; the vassals came when and where the lord summoned them. But it was more common for the lord to exercise his jurisdictions in a regularly meeting local court. When a whole hundred had passed under a lord's control, the hundred court would be the place to administer most of his jurisdiction over freemen. But when, as was commoner, he had only part of a hundred, that part would probably coincide closely with one or more of his manors, and all of his jurisdictional rights might be exercised in his manor courts.

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[1] See above, pp. 38–41, 77, 78.

[2] See below, pp. 188, 189.

Another way of getting at the same matter is to enquire in what courts the three classes of laymen, villeins, non-noble freemen, and nobles, would ordinarily appear. The villein was entirely under the jurisdiction of his lord in the manorial court; his lord's steward presided and his fellow serfs and probably the freemen on the same manor were his judges. The non-noble freeman was under the jurisdiction of his lord, where such jurisdiction belonged to the latter of ancient right or had been acquired through the new disposition of the land, or he might still be subject to the hundred court, as yet a public court. When the freeman was tried in the manorial court, he was judged by the other freemen of the manor, probably not often by the villeins. The noble was tried in the lord's feudal court and by his fellow vassals (in a special sense he was judged by his peers) when his lord held such a court. But where the fiefs were badly scattered, it was more common for the lord to have local groups of his vassals come to one of his manor courts and administer his feudal jurisdiction in that connection. It would be quite common, then, for all three types of private jurisdiction to be administered in the manor court. Certainly this became the rule by the end of the thirteenth century.[1] As if this situation were not sufficiently confused, there was shortly to enter in a new and rival force in the jurisdiction which the king was seeking to build up for his own power and profit. The king, of course, was part of the feudal scheme; he was suzerain, lord of lords, at the apex of the feudal hierarchy. He had his feudal court of vassals, albeit they were scattered throughout England and of course could not all attend.[2] But he was sovereign as well as suzerain and a mighty sovereign, and, beginning with the Conqueror, we find his feudal court doing some extraordinary and unfeudal things in the way of arbitrary interference in cases either in the communal or private courts. The king's court was soon to be the most important factor in English judicial history.

This sketch of the local powers and jurisdictions just after the Conquest must include a mention of the palatine earldoms. The well-known object of these was to erect a specially centralised, efficient, and interested power on the dangerously exposed frontiers. William, whose conquest had done so much to rid England of overpowerful earls, perhaps did not at first feel ready to do entirely without this favourite resource of immature governments; but it is more likely that he accepted something of the sort as a matter of course and that the traditional locations of some such powers in Anglo-Saxon times were of influence. Certain earls were given large, compact pieces of territory which were made practically exempt from state interference, as far as internal affairs were concerned. Chester, Durham, and Kent were the three palatine earldoms established. As Kent was only granted for life, little account need be taken of it. The two others lasted long and had an important history. Several other holdings, especially those on the Welsh border to the south of Chester, fell but little short of these in size, compactness, and freedom from control. But when these greatest of private powers after the Conquest are compared with the houses of Godwin or Leofric in Edward's time, the contrast is sufficiently striking.

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[1] See G. B. Adams, *Private Jurisdiction in England*, American Historical Review, xxiii., 596–602.

[2] See below, pp. 338, 339.

2. **Manor, Vill, and Tithing—Administrative and Police Obligations.**—Besides its court, the manor had other features of a governmental or semi-governmental character. In this period it is impossible to draw the line sharply between what may be considered technically a part of government, whether in public or private hands, and what was not. Duties and responsibilities shaded off from what was clearly governmental into what had to do with private affairs and economic relations. But it cannot be too much emphasised that one must not overlook these humble matters if he is to know the capacity and training of some seventy per-cent of the English population and their fitness for greater things. The lord of the manor was no absolute monarch in his little domain whatever theoretical rights and economic advantages he may have had. Among those who helped in his administration were many of the villeins themselves, and he and his more personal officers were always restrained by manorial custom. His

staff comprised the *stewards* and *seneschals* who had to act as overseers of the whole, to preside in the manorial courts, to keep accounts, to represent the lord on all occasions; the *reeves* who, though chosen by the villagers, acted as a kind of middlemen between them and the lord and had to take the lead in the organisation of all the rural services; the *beadles* and *radknights* or *radmen* who had to serve summonses and to carry orders; the various warders, such as the hayward, who had to superintend hedges, the woodward for pastures and wood, the sower and the thresher; the *graves* of moors and dykes who had to look after canals, ditches, and drainage; the *ploughmen* and *herdsmen*, employed for the use of the domanial plough-teams and herds.[1]

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[1] Vinogradoff in *Cambridge Medieval History*, iii., 481.

And, as already shown, the peasants constituted the manor court; they judged. The steward was not judge, he only presided. Such an organisation plus a system of tenures and services fixed in manorial custom, which as early as the twelfth century began to be embodied in writing in the manorial rolls, bespeak a peasantry that even on their unfree side, their relations with their lords, were not wholly unfree.

But the manor had not obliterated the vill or township, even where the two coincided. The organisation, if it may be called such, of the vill is very obscure; but it was the administrative and police unit for any authority higher up, even to the king. It was used in assessing and collecting taxes, in the care of roads, oversight of vagabonds, and, most important, the whole nexus of obligations comprised now under the term *frankpledge.*[1] From where we left tithing and collective pledge late in Cnute's reign[2] to their reappearance early in Henry I.'s, their history is almost wholly lost. But the decisive thing had happened: the two obligations had been made equally compulsory and the institutions welded together, and undoubtedly after 1066. Dangers arising from Anglo-Saxon hostility to Normans, frequent manslaughter, a king strong enough to use any materials at hand, and keen-sighted enough to know and appraise the novel and obscure local customs of his new kingdom—these things wrought the last great development in the frankpledge. Now, except in a fringe of border counties, the whole body of peasantry and some of the freeholders were bound together in tithings, without choice of pledges or associates, and were not only forced to pursue supposed criminals, but bound to produce at court anyone of their number who might be charged with one of the more serious crimes; and along with these main duties minor police functions such as guarding prisoners, taking them to gaol, etc. It was communal responsibility in criminal matters,[1] household retainers now being the only ones allowed to find a single pledge, their lord. It practically amounted to making every man in a community responsible for every other man. And if the criminal were not produced, the appropriate fine might be collected from the tithing; the whole tithing could not run away and was not likely to be in league with the criminal. All men were their brothers' keepers. In southwest England, and irregularly in some other parts, the tithing and vill are known to have coincided, and the tithingman was simply the township reeve. In the midlands it was sometimes the manor. In considerable parts, it has been found hard to tell whether it was territorial or numerical. Where territorial it was probably oftenest the vill; where numerical, the members must have lived near enough to act together. It is known that where tithing vills were too large to make good police units they were often subdivided, that is, a tithing could be divided into two or more frankpledge tithings. Thus in the mass of English people, as members of manor or vill, hundred or shire, there was much activity and responsibility aside from winning one's daily bread from the soil. Every man, free or unfree, was born to serve the public weal, and here in post-Conquest England he was serving it least often in a military way.

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[1] The manor "consisted, as a rule, of a village community with wide though peculiar self-government and of a manorial administration superimposed on it, influencing and modifying the life of the community but not creating it." Vinogradoff, *op. cit.*, 473.

[2] See above, pp. 67–69.

3. **The Boroughs.**—Although the Norman Conquest resulted finally in greatly stimulating commercial and industrial interests in England, its early effect upon the boroughs was depressing. We have seen that in the late Anglo-Saxon period the boroughs were more and more regarded as being upon the domain of some lord, and

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[1] A feature of this was the well-known "presentment of *Englishry*." A man found slain was assumed to be a Norman and the hundred in which he was found was bound to produce the criminal or pay a heavy fine unless it could present his *Englishry*, that is, prove that he was an Englishman.

that the king had far the largest number.[1] Under the influence of continental ideas, all boroughs became lords' boroughs soon after the Conquest. When the citizens of the struggling continental municipalities of this period were regarded individually, they were, as a rule, classed as servile, and most of them were of servile origin. It was natural that the new Norman lords of the English boroughs should regard the burgesses in the same way. This could not but tend to lower their status, but the idea was so contrary to fact in England that its logical results in the treatment of burgesses were not completely realised. However, the somewhat arbitrary levying by the lord of a payment called *tallage* from his boroughs certainly originated in it. Tallage is to be carefully distinguished from the old *firma burgi*, made up of the rents, tolls, and court fines.[2]

The boroughs also suffered severely from the devastations which William I. found necessary to the complete conquest of England.[3] But the stable peace which the Norman and Angevin kings gave the country and the commercial advantages of the closer connection with the continent soon began to help the boroughs. This was noticeable as early as the reign of Henry I., and from that time the boroughs entered more regularly upon the struggle for liberties and immunities which began slightly before the Conquest. The things they were seeking varied somewhat according as they were king's towns or those of ecclesiastical or lay lords, but may be grouped, in a general way, as follows: they wished their *firma* fixed at a lump sum, and, in the case of the king's towns, paid directly to the king without the sheriff's intervention; they wished to be free from tallage and Danegeld; also as little interference as possible from outside in choosing their officers and in jurisdiction, every burgess being amenable only to the borough court; they strove to lessen the network of tolls by which they were surrounded and which hampered the coming and going of traders. Henry I. granted a charter to London which may be regarded as inaugurating the boroughs' twelfth-century struggle for independence. The privileges conferred by this charter were great, considering the time, and it served as an incentive to other boroughs.

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[1] See above, pp. 32, 33.

[2] *Ibid.*, p. 33.

[3] "The civic population recorded in Domesday fell from 17,000 to 7,000." Medley, *English Constitutional History*, p. 455.

> The privileges of the citizens of London are not to be regarded as a fair specimen of the liberties of ordinary towns; but as a sort of type and standard of the amount of municipal independence and self-government at which the other towns of the country might be expected to aim.[1]

The logical outcome of what the boroughs were aiming at, just as in the case of continental municipalities, was complete political separation. In all countries where the feudal régime was supreme, the municipalities felt themselves to be alien units in hostile surroundings. They were, in many respects, the advance guards of the modern in the midst of the medieval. They learned early the particularity of their interests; their hand must be against every man as every man's hand was against them; the interests of the feudal warrior and of the citizen were antipodal. Any possibility of the towns' profitably sharing in the general government of the country was denied by every condition of the time. Rather it was their purpose to wall themselves off, literally and figuratively, from all governmental surroundings and, while profiting by the growing industrial demands and by commerce, work out their own institutional salvation. They learned the most effective ways to use their increasing numbers and wealth. To buy privileges was their great method, but they knew how to use force upon occasion. These conditions were much the same in Germany, France, and England in the twelfth century. In Germany, owing to the break-down of the central government, the logical conclusion was finally reached, in many cases, in the free cities. In France, it was measurably reached, for a time, in the communes of the north and south; later, all liberty, inside the city walls as well as out, was lost in the absolute power of the king. In England, the boroughs never reached political isolation, nor were their political rights taken away from them by an absolute king; a unique set of conditions and series of events broke down the barriers between them and important elements of the outside population and eventually made it possible for the burgesses to take part in the general government of the country.[1]

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[1] Stubbs, *Select Charters*, pp. 128–130.

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[1] See Part III., § III., 4.

SECTION III

THE CENTRAL GOVERNMENT

1. **The King and his Court.**—The most important and far-reaching result of the Norman Conquest was the strengthening of the central government. We have seen the Anglo-Saxon constitution stronger in the lower part of the structure than in the higher; now, without damage or violent change in the lower part, the higher was transformed and strengthened and the way prepared for the union of the two, which is the key to much of the later constitutional growth.

In the Anglo-Saxon period, the central government consisted of king and witan; after the Conquest, it consisted of the king and his court. The word king, as applying to the first two Norman rulers of England, had a larger content than it had had in Anglo-Saxon times or than it had had in France. And it was not to remain long unchanged; from reign to reign and century to century, one has carefully to revise his conception of the English kingship. It is, perhaps, needless to say that when William conquered England he did not trouble himself about a theory of royalty. He knew its practical limitations in both England and France, and he determined to rid himself of these as far as possible. The substance of power was what he wished. He certainly did not propose to emphasise any break in Anglo-Saxon policy caused by the Conquest; he was the successor of Edward rather than a conqueror introducing new notions. He laid stress upon the promises of Edward and Harold, and, in the coronation ceremony and the important coronation oath, he followed the Anglo-Saxon form.[1] But he immediately began to rule as no Anglo-Saxon king had ruled, and the introduction of feudal tenure and the ambitious expectations of his followers did not reduce him to the empty kind of suzerainty held by the king of France. English kingship changed because there had been a conquest and because the Conqueror was what he was, and because his successors were, for the most part, strong men with a similar determination to rule. Had he been succeeded by weaklings, there is no reason to suppose that it would not finally have fallen back where it was in the person of Edward the Confessor. The Norman kings were not consciously working out an absolutism; they thought it possible to obtain enough power under the old forms. The facts preceded theory; political conceptions were hazy in the middle ages, and before any theory of absolute monarchy arose the king's power began to be limited in a new way and a new set of ideas began to form.

Notwithstanding this general precedence of fact over theory, there is no doubt that there was some notion connected with all medieval kingship that the king was the source of law and the highest authority in administering law. It had passed into Frankish kingship, as had so much else, from Rome. It is easy to get a wrong impression of the vividness with which this had ever been present on the continent, and it did not displace old Germanic conceptions of law. We see it quite clearly in Charlemagne, but after him it had surely lost all reflection in facts. It can also be traced in the Roman gift to Anglo-Saxon kingship, and some Anglo-Saxon kings tried to make it a reality. The Norman Conquest appears to have strengthened this idea in England, and it was to be an important force in the making of the English judicial system.[2]

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[1] On coronation oaths, see Maitland, *C. H. E.*, pp. 98–100.

[2] See Part III., § I.

The best concrete example of the great power that the Conqueror was exercising by the end of his reign and, doubtless, his most original piece of work, was the Domesday survey. While it had no technical bearing upon his relations to his people, either as feudal lord or sovereign, it was of immense practical value in putting the resources of the newly acquired country at his command. The Domesday survey was really a census, undertaken on a scale of magnitude and precision, which, for times when anything of the sort was almost unheard of, testifies, as nothing else does, to the organising genius and energy of its author. William had conquered him a country; it lay open and subdued before him and gave him an unmatched opportunity to do with it as he chose. He would know his new acquisition to the smallest details, its resources, its population, its local conditions and history. The Domesday Book gives us a knowledge of England in the eleventh century such as is possessed of no other European country for the same period.[1]

The early Norman kings in governing took counsel with a body of nobles, a central court, that seems quite analogous in general make-up to the ducal court of Normandy. So many important parts of the English government have grown out of this body that there has, not unnaturally, been much interest shown in its origin. Many scholars have felt great pride in tracing all the best products of England's later constitution to something primitively Anglo-Saxon, and hence have discussed this question with a considerable amount of bias. The cause for pride seems so obviously to lie in the successful development of a primitive institution into something of permanent value that one ought to be able to approach the question of origins with an open mind. The Anglo-Saxon witan would seem a natural and familiar body to the Conqueror. It was a small council made up of the great men, and that was like the Norman ducal court. He would not be likely to question whether just the same principle of attendance governed the two. As to the counselling body which we find in England after the Conquest, it seems from the start to have been largely feudal; within half or three-quarters of a century it was clearly made up primarily of the king's feudal tenants-in-chief. Some of the officials and members of the king's household attended on other grounds, but most of the officials were his vassals. It is clear, and very important to notice, that the king always felt he could invite whom he chose whether vassals or not, as, for example, papal legates; and the lesser tenants-in-chief could not all attend, nor were they expected to. William was not trying to change the witan into a new kind of council; but as feudal tenure began to prevail, most of his counsellors would be those who held from him in chief. He brought in continental feudalism because he knew no other and, when he had done so and especially when his sons had elaborated and defined more sharply some of the feudal principles, any central council or court was bound to be largely a feudal court. One must suppose, then, that things would have worked out in about this way if the Anglo-Saxon witan had never existed; and if he is interested in, and bound to trace, an institutional origin, it will be found in this instance to lead back to the continent rather than to pre-Conquest England.[1]

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[1] The method of making the Domesday survey and the kind of material collected are illustrated in documents 3 and 4 in A. and S., and in *Translations and Reprints* (Statistical Documents of the Middle Ages), pp. 6–7. The method by which the survey was made is of even greater governmental interest than the fact of the survey itself. See below, p. 153.

This council of the Norman kings did not have as well-recognised a name as the Anglo-Saxon witan. It has been the fashion of almost all modern English historians to speak of it as "the Curia Regis," taking these two Latin words over into the English and capitalising or italicising them as if they had come to be a name. But examination of contemporary material shows that there was no distinctive name; terms varied and were quite descriptive in character: it was the "king's court," the "royal court," the "court of the lord king," and many other such phrases, often to distinguish it from somebody else's court. Where the calling of it together is the prominent idea, the term council (*concilium*) is often used, and if the meeting were especially large, adjectives, such as "general" or "great," might be added.[1] Language also might vary according to the function or activity of the body which the writer had in mind. The word court (*curia*) of this time had about the same meanings it now has: the king's court often meant the social or ceremonial entourage or surroundings of the king with the royal presence as the vital factor; it was quite likely also to be applied to this counselling group when its judicial activity was in mind, when it was acting as a court of law; or the court of the king might even indicate a place of royal residence or some part of it.

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[1] Yet it is no wonder that those who continued the Anglo-Saxon Chronicle after the Conquest spoke of the witan as if still existing. The new central court certainly looked and acted like it. And see also Liebermann, *The National Assembly of the Anglo-Saxon Period.*

This varying and descriptive language shows an undeveloped institution of varying activities, and such it was. For this early period it may well be referred to as the king's court, with the understanding, however, that it had no fixed name. It was the Conqueror's custom, apparently from the beginning of his reign in England, to celebrate the three great church festivals of Christmas, Easter, and Whitsuntide by summoning large ceremonial courts where there was much splendour and display. Undoubtedly these not only served to impress people in England and visitors from abroad with the wealth and power of the king, but as occasions for transacting the more important public business; this could be done after the festive part of the occasion was concluded. Also meetings of these great nobles might be summoned for purely business purposes. But the central government's work was growing with marvellous swiftness after the

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[1] It was not, as has often been supposed, described as a "common council." This error has led to much misconception of the character of this early assembly. See *Was there a "Common Council" before Parliament?*, American Historical Review, xxv., 1–17.

Conquest, and when these meetings were over (and they were usually short), some more inclined or more fitted for public work remained behind and were becoming a more permanent group surrounding the king, something more in the nature of his official household, but still a group which may with equal correctness be called the king's court. There seems to have been no distinction of function between these two, except perhaps that matters of great moment might be reserved for the larger body. It is more correct to say that there were not two bodies, but larger and smaller sessions of the same body; when the larger was in session the smaller was merged in it. The king's court aided in all kinds of king's business, apparently quite as it came up, with little or nothing at first in the way of classification. But it did an amount of business that had never been done by the witan, and the beginning of a more permanent group of royal counsellors was extremely important.

2. **Revenue and Taxation.**—The Normans brought into England no ideas on taxation that were in advance of those already there. In fact, the Danegeld under Cnute probably approached more nearly a tax than anything known to the Normans. Hence what has been said of the king's various forms of income as being the proper and sufficient support of king and government, the idea that the king should "live of his own," applies long after the Conquest.[1] But a change in the Danegeld and some changes in the ordinary sources of revenue and the ideas connected with them, changes that formed starting points for later development, need to be noted here.

The Conqueror renewed the Danegeld, which had been dropped by Edward the Confessor, and trebled it. This made it a tax of six shillings on every hide of land.[2] It was levied regularly, and Cnute's idea of it as a regular payment for the support of government was renewed. From the Conquest, there has always been a land tax in

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[1] See above, pp. 51, 52.

[2] The hide averaged about 120 acres. See above, p. 49, note 1.

England. William's use of the Danegeld is a good example of his adoption of an Anglo-Saxon institution that seemed likely to prove of value to him. The trebled Danegeld was oppressive, resting heavily upon the Anglo-Saxon middle class, and probably contributed to the depression of status in that class which was a result of the Conquest.[1] The desire for more accurate knowledge of the wealth of his country, to serve as the basis for the assessment of this tax, was an important cause of William's Domesday Survey. The data obtained served for the assessment of the land tax for over a century.

Under feudalism, some of the requirements of state were provided for in a precarious way by means of the nexus of private contracts. Thus, if all these were kept, the king would be able to lead into the field as many knights as the land of the country was reckoned as owing him. Where feudalism was thorough-going, it could in no way lead to anything like modern taxation, for it related only to nobles. The payments known as *aids* which the king received from his tenants-in-chief were, in theory, voluntary gifts to the overlord on certain exceptional occasions when he was in special need of money—ransoming his body when taken in war, the knighting of his eldest son, and the first marriage of his eldest daughter. If an aid were to be taken upon any other occasion, the consent of the vassals must be expressly given.[2] When the king was able to take such unusual aids with some frequency and regularity, their original character was passing away and they were approximating taxation. This change can be clearly seen in the thirteenth century. Yet it was but class taxation; it was not national. It fell upon a class of men, not a kind of property.

From his vassals the king also received a considerable revenue through the so-called "incidents" of feudal tenure, the most important of which were *relief*, *wardship*, and *marriage*.[1] In the reign of William II., came the well-known abuse of these incidents, but it should be remembered that much was then done in the way of developing and determining them. While long valuable to the king and to other lords of vassals as a source of income, they were not taxation; they were incidental to a special form of private contract. But these contracts were most of them for military service, and where the feudal forms were drawn, as they were in England, in the direction of centralisation and these contracts were controlled by the suzerain, they served the state in a really public way by supplying an army. That this was recognised is shown by article eleven of Henry I.'s coronation charter:

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[1] See above, pp. 92, 93.

[2] What is said of aids or most other elements, expressed or implied, in the feudal contract applies, of course, to any lord and his vassals as well as to the king and his vassals.

> To those knights who render military service for their lands I grant of my own gift that the lands of their demesne ploughs be free from all payments and all labor, so that, having been released from so great a burden, they may equip themselves well with horses and arms and be fully prepared for my service and the defense of my kingdom.

In the reign of Henry I. or perhaps earlier, began the practice of taking *scutage* or shield-money. A good many of the king's tenants-in-chief had not subinfeudated to the extent of the full number of knights they owed the king. This was especially true of the great ecclesiastics. The deficiency was made up by their hiring knights or, what the king probably preferred, by their giving the king the money and letting him hire them. This seems to have suggested that knights who had actually been enfeoffed might, upon occasion, commute their service for money. Most of the fighting was on the continent, and the traditional forty-day service was unfitted for a body of knights drawn from the island kingdom, especially considering the delays which then attended transportation. The idea suited both parties: the king could more easily take money across the Channel and hire troops in Brabant or Flanders than transport the heavily armed knights and their horses, and the knights often preferred to give money to personal service for a distant enterprise in which they took no interest. Scutage did not apply to the tenants-in-chief (except possibly the bishops and abbots who could urge canon-law reasons against taking the field in person) who must serve personally or pay a fine—a fine which was not a commutation, but a penalty for a broken contract and was vastly larger than shield-money. At times, however, understandings were reached in advance in regard to the amount of these fines, the tenant-in-chief compounding for the entire service he owed, and being then allowed to recoup himself in part by collecting scutages from his knights. Scutage seems to have been largely confined to knights on church baronies under Henry I., but in Henry II.'s reign was extended to other knights and became a system for commuting personal service which the sovereign manipulated much to suit himself, and from which he derived much money. Its chief significance relates not to revenue, however; it was one of the forces which undermined the military character of the English knights, marked them off from continental knights, and made possible their notable career in government.[1]

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[1] At the death of the vassal, the possession of his holding reverted to the overlord as a result of the latter's superior right; when the heir of the deceased vassal took possession of the land, the payment of the relief was an acknowledgment of this. When the heir was a minor, the lord was his guardian during minority and received more or less of the land's income. The lord must have a voice in disposing of the hand of an heiress in marriage, as her husband would become his vassal. She was often given to the highest bidder. It is not always easy to distinguish nicely between the normal use and the abuse of these incidents. Although their reason for existence had long passed from them, they and other minor incidents remained sources of revenue until the abolishing of feudal tenures in the reign of Charles II. An excellent account of all the incidents is to be found in McKechnie, *Magna Carta*, pp. 59–65.

A source of revenue that has the appearance of a tax was the *tallage* levied upon his boroughs by the king; this seems to have had its root in two conceptions: one, that a lord had the right, on occasion, to take something arbitrarily from the property of his unfree tenants, something in the nature of a return upon property invested; the other, continental in origin, that the citizens of a municipality were unfree.[1] The king tallaged his towns as a lord of tenants, not as king; hence he tallaged only those on the royal demesne. Other lords could tallage their towns; but it finally became the practice that they should tallage only when the king did. Here again, it was only a class that was reached, and that in a private rather than a public way. Tallage practically ceased in the fourteenth century. Thus for long after the Norman Conquest there was no system of national taxation and no conception of taxation, in any proper sense of the word. The king had various sources of revenue. It goes without saying that, as in the case of Danegeld, the Norman kings retained any important means of supply that had attached to Anglo-Saxon kingship. As a matter of fact, Danegeld was a tax, but it had been the offspring of accidental necessity and had been retained, as any source of revenue, however originated, was always retained. A tax had preceded the idea of taxation. Generally speaking, the Norman king "lived of his own."[2]

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[1] See below, pp. 347–351.

That a vastly greater amount of money came year after year into the hands of William the Conqueror and his sons than had come to Anglo-Saxon kings is beyond question. The primitive strong box in the king's chamber no longer sufficed for a treasury.[1] Soon definite treasuries appeared, at Winchester for England and at Rouen for Normandy. Treasurers were for a time still chamberlains, it is true, but all chamberlains were not treasurers. The treasury was becoming an administrative office, and treasurers soon ceased to be chamberlains; they were skilled clerks, specialists in finance. There was an organisation which in 1086 was capable of the Domesday survey, and which developed rapidly as a result of the survey. The rate of development along financial lines was extraordinary. The king's chamber and wardrobe still contained treasure, royal goods and money, and chamber and chamberlains were part of the travelling household. But most of the money, with its keepers, was at Winchester.[2] An increasing and varied revenue brought with it many problems for adjustment and disputes for adjudication. A judicial or semi-judicial side to the new treasury organisation grew; and the king and his counsellors, the Norman king's court or some portion of it, not infrequently had to act virtually as a court of law in such matters. It was the forerunner of the Court of Exchequer.[3]

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[1] See above, p. 111. The term tallage was not applied to this payment until the reign of Henry II.

[2] Although we reckon England a feudal country after the Norman Conquest, it is interesting to notice, by way of summary, the limitations upon feudal ideas and practice in this the heyday of feudalism; also to identify the source of these in antecedent institutions, Saxon or Norman, or in the operation of the king's powerful self-interest:

1. It was not the law that there was no political bond between men save the bond of tenure.
2. A man was not bound to fight for his lord unless that lord were the king.
3. It was not the law that those not bound to fight by tenure need not fight.
4. Royal revenue and taxation were not wholly feudalised.
5. Jurisdiction, whether or not by royal grant, was not all in private hands.
6. The king's court was not wholly feudal.

For a discussion of these points, see Maitland, *C. H. E.*, pp. 161–164.

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[1] See above, p. 52.

[2] Quite naturally Domesday Book was kept at Winchester.

[3] For the Exchequer as a financial organisation succeeding this one of the early Norman kings, see below, pp. 306–312; on the Court of Exchequer, *ibid.*, pp. 174–177.

SECTION IV

THE CHURCH

THE effects of the Norman Conquest upon the English church were many and fundamental. It not only brought the primitive, insular church into closer touch with continental conditions, but it did this at a time when centralising tendencies, the exaltation of the papacy, separation of church and state, and the strengthening of the former at the expense of the latter were the ruling influences at Rome and at many ecclesiastical centres. The Cluniac movement had reached its height and was soon to be surpassed by the Hildebrandine principles, which, carried to their logical conclusions, would have made Europe a theocracy. Hildebrand had not become Gregory VII. in 1066,[1] but was, and had been for some years, the most influential man in the Roman *curia.* It was a time of exceptional opportunity for the growth of papal influence in Europe, and Hildebrand knew how to take advantage of it. In France, Spain, Hungary, Bohemia, and even Scandinavia, local conditions were most shrewdly used for spreading Cluniac ideas, and especially for emphasising the authority of the pope—where possible, in the concrete form of a papal overlordship of the feudal type; where not, in any form that presented itself.[2]

Most significant at just this time were the papal relations with the Normans who were establishing themselves in southern Italy. In 1059, Pope Nicholas II.

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[1] He became pope in 1073.

[2] See Stephens, *Hildebrand and his Times*, ch. viii.

granted to Robert Guiscard the title of duke of Apulia and Calabria, but on condition that Robert do him homage and hold his dukedom of him upon a strictly feudal basis. In 1064, Pope Alexander II. sent a consecrated banner to Roger, Robert Guiscard's youngest brother, who was engaged in the conquest of Mohammedan Sicily. It was looked on as something in the nature of a crusade against the infidel, and, as the conquest of Sicily had been vaguely taken into account in the negotiations of 1059, there was an expectation on the part of the pope of holding the whole of south Italy and Sicily, the future kingdom of Naples or the Two Sicilies, as a vassal state. Here were Norman adventurers who won for themselves a powerful state, with no shadow of legal right save what may be thought derivable from papal grant and sanction, and who then became vassals of the church. It seemed natural for Norman rulers to come into this personal relation with the papacy, for Normandy stood for very advanced ideas in church reform.[1] When, therefore, at this very time, the duke of Normandy proposed to conquer England, a country over whose church the papacy had almost no control and from whose chief archbishopric the Norman Robert of Jumièges had been recently and uncanonically driven, it is no wonder that Hildebrand was interested, and looked on William's undertaking as a parallel on a grander scale of that of the Norman Roger in Sicily.

> The word Crusade was not yet heard in the Christian world, nor was it to be heard till near thirty years later . . . but a virtual crusade was preached against Harold and his adherents, and all Europe knew that when William's shipbuilding should be ended and he should be ready to sail, his troops would march to battle under the protection of a banner consecrated by the successor of St. Peter.[2]

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[1] See above, pp. 84, 85.

[2] Hodgkin, *The History of England from the Earliest Times to the Norman Conquest*, p. 476.

One of William's chief advisers and his close friend was Lanfranc, who had been made prior of the abbey of Bec in 1045 and was later abbot of a great monastery in Caen, and was thus identified with the most advanced continental thought on church reform. Lanfranc had also been for many years famous as a theologian. His relations with William increased the pope's expectations of church reform in England. But the expectations did not stop with reform. Why should not the Norman kingdom in England follow the example of the Norman dukedom in Italy, and guarantee its continued co-operation with the pope by the close, vassal relation?

William had been willing to profit by the moral support and the prestige which the pope's patronage had lent his undertaking, but he did not intend to allow the pope to gain any hold over England that would diminish his own power. His policy was like that of his ancestors in Normandy, who had favoured a pure and vigorous church and under whom Normandy had become prominently identified with church reform, but who had been masters of everything in their duchy. About 1076, the demand, which must have been expected,[1] came from Hildebrand, now Gregory VII. It was that William should do homage to the pope for England. The papal legate, who brought this demand, bore also the request that the old English payment to the pope, known as Peter's Pence,[2] be more diligently collected and sent. William readily acceded to the latter, but to the demand that he become the pope's vassal for England he sent an emphatic refusal, stating that he had not promised it, and that his predecessors in England had never entered into any such relation with former popes.

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[1] "It is quite within the limits of possibility that, in his negotiating with Rome before his invasion of England, William may have given the pope to understand, in some indefinite and informal way, that if he won the kingdom, he would hold it of St. Peter. In accepting the consecrated banner which the pope had sent him, he could hardly fail to know that he might be understood to be acknowledging a feudal dependence."—Adams, *The History of England* (1066–1216), p. 49. See *ibid.*, pp. 38–50, for an account of the effect of the Conquest upon the English church.

[2] See above, p. 60, note 3.

William's specific policy with respect to the church in England is stated in the well-known rules that have generally been ascribed to him. He would allow no one in his kingdom to acknowledge a pope as true pope except upon his authority;[1] no letters were to be received from the pope that he had not first seen; the national synod of the church was neither to enact nor prohibit anything which was not in accord with his will; no bishop could excommunicate or bring to trial any of the king's barons or ministers except at his command. Whether these rules were formulated by William or the chronicler who recorded them,[2] there is reason to believe that they represent William's purpose and practice, not only in England, but earlier in Normandy. Their enforcement meant royal oversight of the relations between England and Rome and a strict royal control of internal church polity. This clear-cut, masterful attitude of the Conqueror undoubtedly had an influence upon the relations of church and state in England at many later times, and worked itself into the English tradition that shared in producing the important anti-papal legislation of the fourteenth century.[3]

Of the changes necessarily wrought in the English church by the Conquest, enough can be seen in the early post-Conquest period to make clear the general character of continental influence; but it created some conditions, the results of which to church and state showed themselves but slowly. The old problem of the relations of the two English archbishops[1] faced Lanfranc as soon as he became archbishop of Canterbury. While his authority was questioned in the province of York, he could not carry out the reorganisation and reform which seemed to him imperative. That province coincided roughly with the old Danelaw, the part of England that, under Edwin and Morcar, had held aloof from Harold, and was the hardest for William to subdue. It threatened the unity of the church as well as the state. William naturally favoured the claim of Canterbury; the question was referred to Pope Alexander II., who, however, refused to decide and sent it back to an English council. In 1072, a council was held that judged unequivocally for Canterbury. As the decision was based on historical grounds and much documentary proof was adduced, it seems likely that it was intended to be final.[2] Though this was far from the case, yet it settled the matter for Lanfranc's lifetime[3] and gave him his chance to deal with the church as a whole.

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[1] In a time of frequent anti-popes, and when the attitude of a country towards claimants of the papal office might have political bearings, this was a necessary principle for a sovereign who would really rule.

[2] This was Eadmer, who was writing in Henry I.'s reign. He was one of the most reliable and intelligent chroniclers of the twelfth century. For this passage, see Stubbs, *Select Charters*, p. 96.

[3] Why Gregory VII., who must have been offended at what he probably considered William's ingratitude and bad faith, never used coercive measures in order to gain from the Conquest the advantages which he had looked for, is an interesting question. The answer probably lies in the greater importance the contest with the Emperor must have had in the eyes of a pope of that period. And the practical difficulty of dealing with so distant a country as England, filled with the traditions of an independent church and having such a self-willed sovereign as the Conqueror, must have been great.

As Norman barons were given the lands of Saxon earls and thegns, so Norman prelates filled the vacancies in the English church, and many vacancies were made for them. During the first three or four years after the Conquest, the church was left quite undisturbed; here as elsewhere it was William's disposition to let things remain. But it became clear to him and to Lanfranc that a general overhauling of the church was needed. Probably they did not at first realise how serious were the differences between the English church and that which they had always known; its ignorance and its married clergy must have surprised them as much as its archaic customs and its isolation. About Easter of 1070 a council met, at which three papal legates were present. The removal of Stigand, archbishop of Canterbury, whose irregular supersession of Robert of Jumièges had helped win the pope to the support of William, was its first work. From this beginning, the process of displacement and filling of vacancies went on rapidly until, at the end of the year, only two or three English bishops were left. While the reign of William covered the period of the great conflict between Gregory VII. and the Emperor Henry IV. over the manner of investing prelates, William did not abate in the least his part in the ceremony.[1] With this wholesale creation of Norman bishops and the consecration of Lanfranc as archbishop of Canterbury in August of the same year, the transformation of the English church was well under way.

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[1] See above, p. 60, note 2.

[2] The documents were, for the most part, forgeries by Lanfranc. See Adams, *The History of England* (1066–1216), p. 44, and Böhmer, *Die Fälschungen Erzbischof Lanfranks von Canterbury*, cited by Professor Adams.

[3] It was again violently disputed in the reign of Henry I. In 1127, the real matter at issue was dodged by the archbishop of Canterbury's applying for, and receiving, the office of papal legate, on the basis of which he could exercise authority over the archbishop of York. This proved the final, though logically unsatisfactory, solution of the problem: for in 1221, Stephen Langton, archbishop of Canterbury, succeeded in establishing it as a principle that the office which he held necessarily carried with it the legatine power, and that an archbishop of Canterbury was papal legate from the moment of the pope's confirmation of his election.

In the early years of William's reign there was somewhat the same merging of church synod in state council that prevailed during much of the Anglo-Saxon period. But such a confusion was contrary to the continental distinction between church and state, and one marked change is to be seen from the start: whereas the assembly might be summoned by the king, and barons as well as clergy attend, the final decision in church matters lay with the clergy. The church made its own laws. In the course of time this real legislative independence reflected itself in the personnel of the legislative body and the synods were attended by clergy only.[1] While this change was taking place, there was being created the practically new diocesan synod. This was a democratic assembly of the clergy of the diocese. It was important at a later time in connection with the origin of the representative system in Convocation.[2]

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[1] The compromise on the ceremony reached between Henry I. and Anselm in 1106 did not mean that the king gave up at all his power really to determine who the bishops should be. In this connection should be remembered the double position of bishops who were now not only great prelates but also vassals of the king holding baronies from him. Many of the abbots were his feudal tenants-in-chief also, but the king did not so generally interfere in their choice. They were usually chosen canonically by the monks.

Soon after 1070, came William's famous edict separating the lay and ecclesiastical jurisdictions;[3] it withdrew from the local popular courts all matters touching a breach of the ecclesiastical laws and transferred them to courts held by the bishops. Perhaps this was the most striking and sudden introduction of continental practice. But changes were coming fast. When the new bishops and abbots received their endowments of land, it was made clear that a part of the land was held as a barony; that is, the bishop or, in most cases, abbot held land as a vassal of the king, and the number of knights owed from each allotment was fixed. Thus the English prelates came to have two clearly distinguishable sides, the feudal and the ecclesiastical, that one usually associates with the medieval clergy. The new bishops also conformed to continental practice in the matter of residence. The rural seats were abandoned and the bishops lived in the largest towns in their dioceses. The urban seats required more attending clergy, and a development and better organisation of the cathedral chapters resulted. The new bishops moved about less and came in less personal contact with the people of their dioceses, a change that came naturally from their continental training and baronial rank.

The effect of the Conquest on the parish priests was marked, though more gradual. The marriage of priests was common before the Conquest, notwithstanding some attempts at reform in the time of Dunstan; and the ordination of sons of priests, a dangerous abuse, looking as it did towards the formation of a clerical caste, was not uncommon. Celibacy of the clergy was a leading principle in the Cluniac programme. Far-sighted church reformers saw that the transmission of church property by heredity and the building up of family interests would work against the undivided devotion to the church and the centralisation under the pope which they desired. This might seem, then, a natural place for Lanfranc to begin his reforms and push them with vigour. But he was very shrewd and moderate in his dealings with the lower clergy. By ruling that for the future no priests should marry and no married clerks be ordained, he accomplished his end slowly and without upheaval. The Conquest unquestionably resulted in bringing the lower clergy under better order and control.

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[1] Adams, *The History of England* (1066–1216), pp. 44, 45. It is interesting to note, in view of later history, that under Henry I. the Archbishop of Canterbury began to hold his provincial assembly at the same time that the king held his court. See below, p. 379.

[2] See below, p. 374.

[3] A. and S., document I. A discussion of this Ordinance and its relation to later judicial history will be found in Part III., § I., 5.

In all countries where the reform movements had taken root it had often come to pass that the right to present to the parish church was vested in some neighbouring monastery; usually one of the monks received ordination for this purpose, and the church in question was said to be "reformed." In this way the monastery gained nearly complete control over the income of the living and over the incumbent. This undermined the power of the bishop and tended to make the priest the servant of the monastery. It was part of the long conflict between the secular and regular clergy, in which the latter, whose interests were always identified with centralisation and the papacy, were strengthened by every monastic revival. In England, lay patronage had been almost universal before the Conquest,[1] although a few parishes had been "reformed." After the Conquest, many lay patrons, with their continental penchant for making pious gifts to monasteries, parted with their rights. This and the general effect of continental ideas upon the church depressed somewhat the status of the parish priest, who, before the Conquest, ranked with the thegn in the social scale. Lay patronage suffered many invasions in the following centuries. This change, like other ecclesiastical tendencies of the time, worked to break down, or prevent the growth of, any national feeling in the church.

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[1] See above, p. 61.

These reform movements had had their source largely in monasticism. So naturally the English monasteries underwent a change and renewing of life after the Conquest. The appointment of abbots from the continent who brought in the new standards of monastic life, the struggle of the monasteries to free themselves from episcopal control, and the founding of colonies of the great Cluniac "Congregation" were immediate changes. But England was now open to all continental developments; one after another, the new monastic orders of the twelfth and thirteenth centuries were brought in and most of them grew vigorously.

> In general the Conquest incorporated England closely . . . with that organic whole of life and achievement which we call Christendom. This was not more true of the ecclesiastical side of things than of the political or constitutional. But the church of the eleventh century included within itself relatively many more than the church of to-day of those activities which quickly respond to a new stimulus and reveal a new life by increased production.[1]

[1] Adams, *The History of England* (1066–1216), p. 47.

PART III

The Period of Constitution Making

1100–1485

INTRODUCTORY STATEMENT

GROWING out of Anglo-Saxon and Norman material, material brought together by the shock of conquest, English governmental institutions entered upon their great period of growth with the twelfth century. In the last four centuries of the middle ages there were sketched out most of the main features of England's judicial, administrative, and legislative systems.[1] There followed a time of developing and testing, of growing political self-consciousness, of the entry of political idealism into men's purposes. But the middle ages was the time *par excellence* of structural growth in English government. It was the time also when whatever degree of self-government we have attained in modern times was largely made possible through the enforced participation in government work and responsibility of practically the whole English people.

It is needless to insist on the well-known fact that in England there have never been sharp distinctions among the judicial, executive, and legislative departments, surely not in the immature middle ages. Yet no government mature enough or important enough to study fails to make some distinctions in practice along just those lines. However, for a period when everything overlapped and almost none of our modern categories were in the minds of the people, the writer is conscious all the time of the artificiality, the falseness of any scheme of arrangement, logical or chronological. But he must either not write at all or choose an untrue scheme and trust to cross-references and the intelligence of the reader. There is some justification in taking the courts first, for so much was done in the twelfth century in developing the king's court and founding the common law, though much was left for the thirteenth and even later centuries.[1] The great, non-specialised power of king and Council, interpenetrating both courts and Parliament, will be treated next, and in that connection the organs of administration through which central executive authority operated, and the all-important governmental work of the people in the localities under the king's command. But the barons fought to control the king and Council, using and developing the principle of the supremacy of the law; and the barons often believed and often made others believe that they spoke for the nation. Thus the examination of a new, extra-royal source of authority enters here and the beginnings of limited monarchy. Parliament, dealt with third, was becoming recognisable as such by the early fourteenth century; and Parliament—made by the king and used by him for his own purposes and, like most early features of government, largely judicial in its work—had, before the close of our period, shown that it could upon occasion draw to an issue with the king and embody an authority outside him, and also that its future lay in the field of legislation.

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[1] The great institution whose making belongs almost wholly to modern times is the cabinet system of government, the principle of ministerial responsibility. But even here the problem was seen in the middle ages and some notable attempts made to solve it. And it is of course in modern times that Parliament—at first aristocratic, but since the late nineteenth century controlled by the people—has gained its final victory over the king.

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[1] "Of all centuries the twelfth is the most legal. In no other age, since the classical days of the Roman law, has so large a part of the sum total of intellectual endeavour been devoted to jurisprudence."—P. and M. i., iii. "In the natural course of all constitutional history the judicial precedes the legislative."—Shirley, Preface to *Royal Letters* [Rolls Series] ii., p. xviii.

SECTION I

LAW COURTS

1. **The Central Common-Law Courts, the Circuit Courts, and their Procedure.**—As soon as the early disorder resulting from the Norman Conquest had subsided, the attempts to bridge the gap between central and local government began. Kings who had a conquered country before them, who felt their strength, would not be long in finding occasion to make themselves felt at every point. William II. brutally and directly seized wealth and power. Neither he nor his famous minister was a statesman, and, although they accomplished some things of importance in their application of feudal principles to the church and in developing the details of feudal obligation,[1] their expedients, for the most part, appear gross and temporary. A king and a minister of a different sort followed them. The combined work of Henry I. and Roger of Salisbury, his justiciar, was fundamental. Their aim was the orderly, peaceful, and efficient government of the whole country and the strengthening and aggrandising of the central power.

The king had more work to do and the king acted officially through his court. Hence this feudal council felt keenly the pressure of business. In the earlier reigns, it had been a comparatively simple and undifferentiated body, but as it had more to do it developed. This development was the institutional manifestation of a growing activity and effectiveness of the central power, and was along four main lines. First, the more permanent group of king's counsellors[1] became a more regular and recognised body. Second, a classification of business which had probably begun in the preceding reigns resulted in two sessions of this body spring and fall—with an organisation and perhaps a membership specially suited to the work—for financial business, to receive the revenue brought from the counties by the sheriffs. It was the early Exchequer.[2] Third, to give better attention to the king's interests in the localities, he sent out members of his court from time to time on circuits, or "iters," that they might from close, personal inspection accomplish what they could not from a distance. Fourth, the judicial work of the court began to extend beyond cases in which the king or its members were personally concerned, and limitless possibilities of judicial growth were opened when civil suits between man and man began to be entertained. The two last-named developments need further discussion here.

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[1] See above, p. 121.

The practice of sending members of the court into the localities to transact the king's business was fitful and uncertain at first and was used only when there was something exceptional to be done; but before the end of the reign it had become an established custom.[3] The things that these itinerant members did were the same in general character as those done by the central body; they looked after wardships and escheated property, inspected arms, took oaths of fidelity to the king, saw whether any one had left the kingdom or built a new castle, saw that the king had his rights in such judicial matters as he might be concerned in, attended to all matters touching the royal revenue—in short, they did all the royal business that they were instructed to do when they were sent out. As it has been aptly expressed, they carried the king's court down into the locality and did a branch business there. They remind one strongly of Charlemagne's *missi*, and though they were probably not institutionally derived from these,[1] the same general causes brought them forth. Charlemagne was suspicious of the loyalty and efficiency of his counts, and the *missi* were to check and supplement the counts' work. Henry I. was suspicious of the sheriffs, and the English *missi* were to make known or remedy the sheriffs' shortcomings. These king's messengers were soon known as itinerant justices, but the word justice must not be understood to mean that their work was wholly judicial. It was nearly two centuries before that was the case. Itinerant justices might be sent out on purely judicial business, and toward the end of Henry I.'s reign were probably so sent with some regularity; but their usual work was of a general administrative sort.

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[1] See above, p. 119.

[2] *Ibid.*, p. 124. The primitive king's court transacted any kind of king's business just as it happened to come up. Pressure of work taught it the economy of time and labour in doing all of one kind at one time. Financial business was the first so classified.

[3] There were occasional instances of this practice in the earlier Norman reigns and even before the Conquest. For an instance in the reign of William II., see A. and S., document 6.

The judicial work of either the Saxon witan or the early Norman king's court was small; it was confined to "great men and great causes." Many cases in which the property rights of the king were more or less directly concerned would come up for trial in the local courts. A few instances are known in which, even before the Conquest, the king sent a representative into a local court or imposed his order upon that court to the end that a matter in which he was involved might be speedily and satisfactorily concluded. After the Conquest, this royal interference was more frequent. Logically, the next step in extending this kind of interference would be to draw the case entirely out of the local court and try it in the king's court, or what was virtually the king's court owing to the presence and influence of the king's representatives. And so itinerant members of the king's court might be sent to perambulate a district trying royal pleas.[1] For doing most of their work, but especially the judicial, the itinerant justices probably had the counties before them in specially full meetings of the county courts.[2]

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[1] Professor Hazeltine believes they were. See his Introduction (p. xiii) to Bolland's *The General Eyre*. He believes there was a direct line of connection through Norman practice brought into England at the Conquest. This certainly has not been proved.

But the king might become interested in a case owing to the position or influence of one of the parties, and where he had no property concern whatever. The plaintiff, despairing of speedy or satisfactory justice in the local court, might be in a position to secure royal interference. The king was restrained by no theories about the boundaries of jurisdiction. He felt himself the source of law and he was strong, and he would interfere where there seemed to him reason to do so. As such interference became frequent, the payment of a sum of money by the plaintiff was the commonest means of securing it. When the intervention had been bought, the king sent an order to the defendant bidding him right the alleged wrong. If this order were disobeyed, the result was to bring the defendant before the king's court to show cause. This was a technical result, for the king's order had been disobeyed, and disobedience of the king's order had been a reserved crown plea at least as far back as the time of Cnute. It amounted to evoking the case from the local court, where it would ordinarily have been tried, into the king's court. The commoner such a practice became, the less likely was the defendant to be awed by the royal command, which thus became the first step in a regular procedure. Also an order might be purchased which directed the lord of the private court in which the case was to be tried to do justice to the applicant, and which added the threat that if he did not the king's sheriff would. These practices foreshadowed both the writ of right and the writ *præcipe*.[3] The royal order, being formal and important, was written. Hence it was called a writ, a name which, up to that time, had borne no special legal sense. These cases were all civil and the rule became established that every civil case tried in the king's courts must originate with a writ.[1]

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[1] See A. and S., documents 2 and 6.

[2] Whenever the king dealt with the county it was with a unit, almost like a corporation, and it was identified with the county court. This identity is reflected in the language of the time; *comitatus*, the word always used, may be translated either county or county court.

[3] See below, p. 148.

With the opening of this possibility, men would try to get their cases into the king's court if there were any advantage to be gained by the change. There was an advantage in the better law and better methods employed. The old procedure of the local courts was clumsy and inflexible; owing to its formalism, it often failed to render justice and was not fitted to meet the changing conditions which followed the Conquest. The king's court began to supply what was essentially an equitable jurisdiction; it was free from the trammels of the old formalism and was doing justice by the most direct means possible. It was a court made up of Frenchmen, where the French language was used; but it did not simply transfer French or Norman law to England. It made use of any principles, French or English, which suited its need, and it did not hesitate to strike out on new lines.[2] But men who wished to have their cases tried in this new court had to pay for the privilege, they had to buy the originating writs. There was thus a transaction profitable to both parties. Men liked to get their cases into the king's court, for they felt surer of justice there; the king liked to have them buy the privilege, for it swelled his revenue.

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[1] For a primitive writ belonging to the reign of Henry I., see A. and S., document 9.

[2] "Of the law that this court administered we know little, only we may guess that in a certain sense it was equity rather than strict law. On the one hand the royal tribunal cannot have held itself straitly bound by the old English law; the men who sat in it were Frenchmen, few of whom could understand a word of English. On the other hand it must often have happened that the traditional Norman customs would not meet the facts, for a Norman count and a Norman bishop would be quarrelling over the titles of their English *antecessores*, and producing English land-books. Besides the king didn't mean that England should be another Normandy, he meant to have at least all the rights that his cousin and predecessor had enjoyed. . . ." His jurisprudence was "flexible," "occasional," "dealing with an unprecedented state of affairs, meeting new facts by new expedients, wavering as wavered the balance of power between him and his barons, capable of receiving impressions from without, influenced perhaps by Lombard learning, modern in the midst of antique surroundings. In retrospect it would appear to a man of Henry II.'s day as something so unlike the *laga Edwardi* that it must be pronounced distinctively unEnglish, and therefore distinctively Norman, and Norman in a sense it was. It was not a jurisprudence that had been transplanted from Normandy; but it had been developed by a court composed of Frenchmen to meet cases in which Frenchmen were concerned; the language in which men spoke it was French, and in the end so far as it dealt

The central government was in a most vigorous condition at the close of Henry I.'s reign. Almost any future seemed possible for the fertile and adaptable royal court. But it was a critical point in its history. This central system was young and lacked the hard and fast qualities of one of long standing, well known and taken for granted by the people. It still needed guiding and sustaining. When these were suddenly withdrawn by Henry's death and his successor's ill-advised quarrel with the administrative family, and the country experienced a long period of civil war and general anarchy, the promising governmental beginnings passed away. That Henry II. had a genius for government, that he came to the throne while his grandfather's system was still remembered, that he himself had been trained to understand and appreciate it, above all, that it had, during the anarchy in England, been continued and perhaps developed in Normandy by Geoffrey Plantagenet, Henry II.'s father, were vitally important conditions of England's later institutional growth, especially along judicial lines.

Henry II. was a born lawyer, and his reign stands preeminent in the legal history of England. When he came to the throne he saw lawlessness everywhere. His ambition, like that of the Norman kings, was to gain for him-

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with merely private rights, it would closely resemble a French *coutume*."—P. and M. i., 107, 108.

"Among the most permanent and momentous effects of that great event" (the Norman Conquest) "was its effect on the language of English lawyers, for it is not a small thing that a law-book produced in the England of the thirteenth century will look very like some statement of a French *coutume* and utterly unlike the Sachsenspiegel, nor is it a small thing that in much later days such foreign influences as will touch our English law will always be much rather French than German."—*Ibid.*, i., 87.

self the substance of power, really to rule England. The first step was to bring the lawlessness to an end; and the central principle of his reign may be said to have been the maintenance of peace, the protection of life and property. He did not legislate upon a large scale; new law came in a more incidental and unconscious way. To his mind, new law was not needed so much as the enforcement of the old. Indeed, new law was not a conception of the times. But he found the old judicial machinery unfit for the kind of enforcement that he proposed, and it was not sufficient to renew that of his grandfather's time. Henry II.'s great work was the devising of methods to meet practical judicial needs, and for this he displayed a genius that has perhaps never been surpassed. So permanent and fundamental did his new schemes for enforcing the law prove that they profoundly affected the body of the law itself, and what is most characteristic in the English common law and procedure either originated or was in some way foreshadowed in his reign.

Henry II.'s work has been summarised thus: "The whole of English law is centralised and unified by the institution of a permanent court of professional judges, by the frequent mission of itinerant judges throughout the land, by the introduction of the 'inquest' or 'recognition' and original writs as normal parts of the machinery of justice."[1] The discussion of this work may be introduced by briefly describing, in chronological order (as far as that is known), Henry's chief judicial innovations. In the Constitutions of Clarendon,[2] 1164, we find a method of determining whether a certain piece of land, about which there was some litigation pending between an ecclesiastic and a layman, was a lay holding or in frankalmoin,[3] whether it was lay fee or alms. If the latter, the case was to be tried in the church court; if the former, in the king's court. Hence the preliminary question was one of importance and Henry ordained that it should be determined by putting on oath twelve men of the locality where the land lay and causing them to state which it was. But this question might arise when it was preliminary to no further question about the land, and this method of determining it developed into a regular action in the royal courts, known as the assize *utrum*. It became the normal action, touching right in land, in use by parish priests. There is some evidence that before Henry's time the same method had been occasionally used, but he made it normal. In the Constitutions of Clarendon, Henry also claimed successfully for the royal courts cases involving the right to present to churches and also debt cases. He further claimed the punishment of criminous clerks who had been tried and convicted in the church courts, but owing to the unfortunate ending of his conflict with Becket he was not able to keep this.

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[1] P. and M. i., p. 138.
[2] A. and S., document 13, and W. and N., pp. 370–375.
[3] See above, p. 101, note 1.

Two years later, he instituted an action far more important than the assize *utrum*. In the disorderly state of society produced by the preceding reign, violent and unjust disseisins were common; men were thrust out of the seisin or possession of their lands by the strong hand and left to the doubtful and dilatory justice of the old courts to recover it. To remove this abuse and bring order into society, Henry determined to protect possession, as such, by a summary process in his own court. Suppose *A* claimed that without court judgment he had been recently turned out of possession by *B*. *A* could now obtain a writ from the king ordering his justices to summon twelve men of the locality where the alleged disseisin had taken place, put them on oath, and ask them this question: Has *B* since such a time, unjustly and without a judgment, disseized *A* of such a holding? If the answer was yes, *A* was restored to his possession. To be sure, *B* may have had a better right to the land notwithstanding *A*'s possession of it, but this must be shown in the courts and a judgment obtained. It was Henry's purpose to have no more people turned out of their land except on the basis of judgment regularly rendered in court. This new process was known as the assize of *novel disseisin.* Old disseisins could not well be taken account of; they must be within easy memory. Arbitrary dates were fixed from time to time, all disseisins before which were not considered *novel.* The assize of *novel disseisin* was a possessory assize, which means that it dealt only with the question of possession, not with the question of best right. This was the first of the three famous possessory assizes made by Henry.[1] In the document known as the Assize of Northampton,[2] 1176, is found the first mention of the assize of *mort d'ancestor* (death of the ancestor). This assize was to protect heirs, to prevent violent and unlawful confiscations by overlords or others upon the death of a property holder. The principle contained is this: if a man died possessed of real estate and some one claimed that he had had a better right to the property than the dead man, he could not prevent the latter's heir from taking possession until he had received a judgment in his favour by regular legal process. The question of fact, whether the ancestor died possessed of the property, was answered by the statement under oath of twelve men of the locality. The third possessory assize had to do with the presentation of clergymen to livings. Such presentation was known as advowson. If a question arose as to which of two persons possessed the advowson of a certain church, twelve men of the locality were summoned and put on oath to tell who presented to this church last, and he who had done so was given the privilege of presenting this time. But the claim might be made that, although he did present the last time, he had had no right to. In that case, remedy might be sought in the king's court also; but the determination of a question of best right was likely to be a long process, and, in the meantime, the church must neither be kept vacant nor he who possessed the advowson, in virtue of his having made the last presentment, be turned out of his possession. The new action in the king's court by which the possession of the advowson was determined was known as the assize of *darrein* (last) *presentment.*[1]

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[1] Detailed study of the judicial history of the century following the Conquest, both in England and Normandy, shows foreshadowings of this and the other possessory assizes; yet Henry's share in their making is shown to have been a commanding one.

[2] A. and S., document 16, article 4

Acting on this same principle of protecting possession and very likely at about the same time that the *novel disseisin* was instituted, Henry began to interfere in actions determining best right. He declared that no man could call in question a tenant's right to his free tenement without beginning his proceedings by obtaining a royal writ. This writ was known as the *writ of right*, and, although it did not necessarily bring the trial of the case into the king's court, it gave the tenant decided advantages and extended a royal procedure. The writ of right was irregularly in existence before this.[2] The new thing that Henry did was to give the tenant his choice between accepting the demandant's offer of the wager of battle, or, as it was termed, putting himself upon the *grand assize.*[3] By this latter mode of proof, the question at issue was determined by the sworn statements of knights of the neighbourhood taken before the king's justices. The writ *præcipe*,[4] which came into use in the same reign, marks a still further royal interference in proprietary actions. In it, the king ordered the tenant to restore the land which the demandant claimed or, if not, to appear in the king's court "to show cause wherefore he has not done it."[5]

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[1] For illustrations of the three possessory assizes, see A. and S., document 24, and W. and N., pp. 60–64.

[2] See above, p. 142.

[3] The word assize, originally denoting a sitting or session, was at this time assuming restricted and somewhat technical meanings. From a session of the king's court, it passed to the set of decrees issued at that session, then to certain actions instituted by those decrees, and finally to the procedure by sworn inquest which was the distinguishing feature of those actions.

[4] A. and S., document 20, and W. and N., pp. 58, 59.

[5] The origin of this writ is to be found in the early royal rights, the cases reserved for the king's own justice. Well known lists are in the

Henry II. seems to have issued this writ whenever he chose, and in this way an action which involved the question of best right to land could be brought bodily into the king's court. In the proprietary actions concerning advowson, that we have seen drawn into the royal court, the same choice was given the possessor as in the case just considered. In these instances, the king was getting control of, and changing, old actions; the possessory assizes were newer.

Henry II.'s third great judicial innovation was the use in his courts of a new method of learning of suspected criminals. The first mention of the method in this reign was in another connection. In article 6 of the Constitutions of Clarendon, the king was correcting what he considered an abuse in the church courts, as well as providing a means for bringing to trial those whom individuals dared not accuse. Men were not to be brought to trial on unsubstantiated rumour, but if some individual were not ready to come forward and make the accusation, twelve freemen of the suspected man's neighbourhood were to be put on oath before the bishop and state their belief as to whether he ought to be tried for the matter in question. The sheriff, at the bishop's request, was to bring these men before him. Two years later, in the Assize of Clarendon,[1] this machinery of accusation received its epoch-making extension. It is a notable instance of Henry's boldness and originality in dealing with the difficulties and disorders which he found in the country. The problem of bringing criminals to justice had remained to this time unsolved, except for the old method of private initiative—the *appeal*. The wronged man or his relatives could appeal the suspect and the courts would take cognisance of the case when thus started. There was the

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Leges Henrici Primi and in Cnute's laws. This one was the *placitum brevium vel preceptorum regis contemptorum*. It was a royal offence to disobey the king's writ. Hence if the king orders *A* to restore land to *B* and *A* disobeys, it is a case to be tried in the king's court and will turn on the question of the better right to the land.

[1] A. and S., document 14, and W. and N., pp. 375–380.

tacit assumption that crime concerned the individual and not society; and through bribery, intimidation, or, in the case of manslaughter, the indifference or lack of kin, very many criminals were not brought to trial. Sooner or later every advancing state has reached the point where it recognises that crime wrongs society and that the prosecution of suspects cannot be left wholly to private initiative. There is special interest in the way in which this forward step was taken in England. Crime of all sorts had increased with impunity in Stephen's time, and here the peace problem pressed upon Henry. With his hands freer from continental matters than before, he now addressed himself to it. His method was to make regular in his own court the already slightly used machinery for finding suspected criminals, and to impose new and cruel punishments upon those convicted. Quick retribution was to impend over every murderer, robber, or thief, or those who harboured such. Twelve men from each hundred and four from each vill were to give information on oath, based either on their own knowledge or on common report, whether there were at that time in their localities suspected murderers, robbers, thieves, or the receivers of them. The men thus named were put to the old form of proof, the ordeal. The Assize of Clarendon, whose first article instituted this new procedure in the king's courts, was drawn up in view of an immediate journey of the justices throughout the land. But the new method of detection was not confined to the use of the justices; the sheriffs were also to use it, and, when the old shire court had declined and lost its criminal business, it became the basis of a new, but limited criminal jurisdiction of the sheriff.[1]

In the Assize of Northampton,[2] ten years after the Assize of Clarendon, the king was still fighting crime by the same method, but forgery and arson were added to the crimes that were thus being drawn into the royal courts and the punishments were still more severe. It was through these Assizes and the formation of the common law in the period following, that the idea of felonies, the specially serious crimes, was taking shape. The list came to be homicide, arson, burglary, robbery, rape, and larceny. Later there were other crimes made felony by statute, and the death penalty, except in the case of petty larceny, became the rule.[1] It should be noted here that the men who presented suspects were not really accusers; they did not commit themselves to a belief in any one's guilt. Nor were they witnesses; they gave no testimony about crime. They simply constituted a searching means of getting at popular report and belief; this they were under oath not to conceal, and if such report reached justice or sheriff through another channel they were liable to fine for non-fulfilment of their duty. The representatives from the vills were probably largely from the villein class; they would know the suspects of their own class and be posted on all local rumour. They reported to the twelve men of the hundred, most of whom would be knights, and the latter made what use they chose of this information in the final statement to the justices.

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[1] See below, pp. 181, 182.

[2] A. and S., document 16, and W. and N., pp. 56–58.

In this summary of Henry II.'s judicial changes, two institutions have been mentioned that need further explanation, the writ and the group of neighbours put under oath to answer questions at the royal command. A few words will suffice for the first. The general meaning of the word writ in the reign of Henry I. has been noticed; also the fact that it had begun to have a special, legal use in connection with the written orders sent out by the king to ensure and hasten justice in cases in which he was interested.[2] In Henry II.'s reign, the writ was a recognised institution and began to differentiate and become technical. In each of the possessory assizes, the first step was to obtain from the king a special form of writ applying only to that particular action. There were also writs suitable for opening each of the proprietary actions over which the king's court was getting control. A proprietary action for land, the commonest and most important, was begun by the writ of right or the writ *præcipe*. As actions became regular and frequent, their appropriate writs became stereotyped; but as new actions passed under the jurisdiction of the king's court, new writs were made to suit them, which, in the course of time, became stereotyped also. These regular writs were known as *writs of course*. Writs were sold and became an important source of royal revenue; many people were willing to pay for the better law and procedure of the king's court. The drawing up and issuing of writs was an important function, which, already in the twelfth century was an important part of the work of the king's secretariat, the Chancellor and his staff.[1] Every civil case tried in the royal courts originated with the purchase of the appropriate writ; hence these writs have become known as *original writs* to distinguish them from writs issued for any purpose after the actions had begun.[2] The manufacture of new writs by the Chancery was, under a strong king, an adaptable and efficient means of extending the royal jurisdiction.[3] In this lies the great importance of the original writ in the judicial history of the twelfth and early thirteenth centuries.

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[1] On the distinction between clergyable and non-clergyable felonies, see below, pp. 251, 252, note 4.

[2] See above, pp. 142, 143.

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[1] See below, pp. 312, 313.

[2] In the thirteenth century there grew a large class of writs known as writs of trespass. This was because civil wrongs, "torts," were regarded as falling within the limits of a breach of the king's peace. "Any wrongful application of force, however slight, can be said to be made *vi et armis et contra pacem domini Regis*." For illustration, see Maitland, *C. H. E.*, pp. 113, 114.

[3] "The metaphor which likens the chancery to a shop is trite; we will liken it to an armory. It contains every weapon of medieval warfare from the two-handed sword to the poniard. The man who has a quarrel with his neighbour comes thither to choose his weapon. The choice is large; but he must remember that he will not be able to change weapons in the middle of the combat and also that every weapon has its proper use and may be put to none other. If he selects a sword, he must observe the rules of sword-play; he must not try to use a cross-bow as a mace."—P. and M., ii., 561.

The group of neighbours who gave the king information under oath will be recognised as a primitive jury. It is necessary here to make some inquiry into the jury's origin and early history. When William the Conqueror wished information on some local matter, commonly something about the value of land as bearing on the royal revenue, he sent an official to the locality or an order to a local official to summon a number of men who would be likely to know, put them on oath, and question them. Their answers were written down and sent to him. This process was known as *inquisitio*, that is, inquest or inquiry. It was thus that William gathered the vast mass of local data contained in *Domesday Book*. This sworn inquest was the institutional germ out of which the modern jury and much else of governmental interest have grown.

It has naturally been a question of great interest whether William made use here of an institution which was Anglo-Saxon or one which he brought with him from the continent. English scholars have been loath, in this, as in the case of some other institutions, to abandon a native origin. But at present no scholar denies that the jury came from the continent; William was simply continuing to use in England a machinery for getting local information which had been used in Normandy. Like many other Norman institutions, this had come from the Frankish state. It is known that the Carolingian sovereigns of the eighth century used this method in learning about lands and permanent rights. Between this eighth century Frankish institution, then, and that of the first Norman king of England there is an undoubted line of connection.

If the inquiry into origins be pushed a step further, a problem is encountered. It may be said to begin with that, like all Frankish institutions, the sworn inquest was either primitively Teutonic or else Roman in origin. All Teutonic peoples, of whose early customs we have any considerable knowledge, had institutions which bore a superficial resemblance to the one under discussion. In dealing with Anglo-Saxon courts three institutions have been briefly described that must be mentioned again here.[1] These were the suitors to the local courts who acted as judges, the compurgators, and the sworn witnesses. Their analogues are found among other Teutonic peoples, and in looking for a possible germ of the jury these institutions first attract attention. Here were representative men of the community, and, in both civil and criminal suits, their neighbours' fate lay largely in their hands. Are they not, then, like a jury? Looking at the matter in an untechnical way, there is an element of truth in the suggestion. The developing English jury of the thirteenth and fourteenth centuries derived some of its sanction and spirit from the Teutonic notion of a popular and local source of justice, which doomsmen,[2] compurgators, and sworn witnesses all illustrate. But this is a matter quite apart from the question of the jury's institutional origin. In returning to that, it is useful to contrast briefly the sworn inquest of William I. with these three institutions. The suitors of the local courts were judges largely in their discretionary application of the *proofs* to the cases in hand.[3] The compurgators were men who swore with the plaintiff or defendant, basing the oath however upon no knowledge of the facts of the case. The witnesses were brought into court to swear to a set formula, the nature of which they knew in advance.[4] The inquest was a royal institution by which men of a locality answered upon oath questions put to them by some one acting under the royal command, and about a matter, usually relating to land and revenue, in which the king was interested. The contrast is obvious. It cannot, perhaps, be dogmatically denied that the early Frankish kings had adapted to their own use and developed the Frankish institution that corresponded to the Anglo-Saxon sworn witnesses, but there is no evidence of it. There is no possibility of the inquest's having come from either of the other two institutions.

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[1] See above, pp. 17, 18, 21–23.

[2] The name given to the group of suitors who often exercised the judging function for the whole body.

[3] "When both the jury and the body of doomsmen are already established institutions, the transformation of doomsmen into jurors may be possible, and this transformation may actually have taken place in our manorial courts. . . . But that the jury should have originally grown out of a body of doomsmen seems almost impossible. . . . A verdict, even though it may cover the whole matter that is in dispute between the litigants, even though it may declare that William has a better right to Blackacre than has Hugh, differs essentially from a judgment, a doom adjudging the land to William. Even though the form of the verdict and its conclusive force be such that the judgment must follow as a mere matter of course, still between the sworn verdict and the judgment there is a deep gulf." P. and M., i., 139.

[4] "The witness is called in by the party—the party to whom the proof has been awarded—to swear up to his case; the juror is called in by the sheriff or by the court to swear to the truth whatever the truth may be." Maitland, *C. H. E.*, p. 119.

There existed, however, in the later Roman empire a custom the same in all essentials as the one whose origin we are discussing. It went by the same name, *inquisitio*, was used by the central government, and for the same general purpose. For the interval between the fall of the empire and the eighth century no evidence has been found, so that it cannot be asserted positively that this was its origin; but in view of the amount of borrowing of this sort that is known to have taken place, it is more probable that the Frankish kings took the institution from Rome in just the form in which they so long used it than that they made over a practice of the native, local courts into an instrument of central power.

The regret which some writers have evidently felt at having to abandon an Anglo-Saxon, and even a Teutonic, origin for the jury seems uncalled for when the matter is properly considered. The sworn inquest was an existing institution which English kings, courts, and people chanced to seize upon, and which, in the course of centuries and through many unforeseen influences, they made over into something that was in many respects radically different. The primitive inquest was a piece of administrative machinery which had nothing to do with a court system, central or local; throughout its known history, it had been an instrument of royal power, and probably often, as in the hands of William the Conqueror, of royal oppression. The matured judicial jury has done its service and won its renown in safeguarding the liberties of the people from the encroachments of monarchy; while through the jury outside the courts the king drew the people into all sorts of public work and responsibility,[1] even the House of Commons growing largely out of the jury principle. On the continent, the sworn inquest had no such development. From Charlemagne to William the Conqueror, it had remained almost unchanged, and everything which has made it a notable or admirable institution it has gained on English soil.

There was little change in the inquest until the reign of Henry II. William I. and succeeding kings had occasionally used it in connection with judicial matters,[2] but there was no regularity or special purpose in such use; if the king were interested in a certain case and wished the facts, he would use this method, just as in other subjects of local inquiry. When Henry II. made use of it in determining whether a disputed holding were free alms or lay fee, he was not applying it to a new subject-matter; but when this preliminary procedure in the king's court grew into the assize *utrum*, this royal method of learning the truth necessarily became the most important part of the procedure in the new action. The same thing was true of the other new actions of this reign; and, in the old actions that were drawn into the king's court, the jury trial became optional with one or both parties to the suit.[3] It became quite naturally the normal method of trial in civil cases in the king's court, superseding the old proofs.

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[1] See below, Pt. III., § II., 4, *passim*.

[2] For examples, see A. and S., document 2, and W. and N., pp. 51–55.

[3] In this connection arose the technical distinction between *assize* and *jury*. The assizes, *i.e.* the grand assize and the four petty assizes (the three possessory assizes and the assize *utrum*) were perfected by Henry II. through definite legislation. In them the new procedure by jury—*assize* it was called in these cases—was obligatory. In them the question of fact was formulated in the original writ and the first step was the summoning of the jury by the sheriff. In other civil actions in the king's court, the original writs said nothing of a jury; but if a question of fact arose in the pleadings it was optional with the parties whether or not this should be submitted to a jury—*jury* here used in a narrower, technical sense to distinguish it from *assize*. This might happen even in the assizes, where, if through an *exception* raised by either party the question of fact came to differ from that stated in the original writ, the parties might consent to submit it to a jury, and, as it was said, the *assize* was turned into a *jury*. The assizes were limited in number; the great growth of the jury in civil

The jury of accusation, however, the jury which presented suspected murderers, robbers, and thieves, seems something new, for it did not answer the old questions about property or revenue; it was the same machinery, but employed upon a different subject-matter. It was not however new, for, though not the normal use of the inquest, the Frankish kings of the ninth century had employed the sworn statements of men in the localities to find out about delinquent officials or serious crimes, matters that threatened the country's peace. A use of the inquest similar to this had at some time passed into the Frankish church, probably by royal grant; and, in certain places, this so-called synodal jury had become a well-known institution. There is no conclusive evidence, however, that a presenting jury had existed in either England or Normandy before the time of Henry II.[1] In the Constitutions of Clarendon, is a provision which suggests such a jury for cases in the church courts where "the accused be such that no one will or dares to accuse them."

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actions was through the option of litigants. They had learned its usefulness from the assizes. "In the course of time the jury, which has its roots in the fertile ground of consent, will grow at the expense of the assize, which has sprung from the stony soil of ordinance." P. and M., i., 149.

[1] This method of presenting criminals may have been occasionally used by the Norman kings in connection with matters touching the royal revenue, for there were fines and confiscations connected with crime. But Henry II. had a broad peace purpose in addition to his revenue motives.

Regarding the famous and anomalous case of the twelve senior thegns in the reign of Ethelred II., Maitland says: "There is however one law that must cause some difficulty. It is a law of Ethelred the Unready, published, so it would seem, in the year 997 and applicable only to the Danish district. In it we hear how a moot is to be held in every wapentake, and how the twelve eldest thegns are to go out with the reeve and to swear upon the relic that he puts into their hands that they will accuse no innocent and conceal no guilty man. Certainly this looks like a jury of accusation; but the context will make us doubt whether we have here a law of any generality. There seem however to be good reasons for believing that some of the Scandinavian nations came by a route of their own to something that was very like the jury. . . . We cannot say *a priori* that there is only one possible origin for the jury, we cannot even say that England was unprepared for the introduction of this institution; but that the Norman duke brought it with him as one of his prerogatives can hardly be disputed." —P. and M. i., 142, 143.

A similar provision, applying to the Norman church, had been made in 1159. In these instances, Henry was probably reviving a custom that had fallen into disuse. The great thing that he did in the Assize of Clarendon was to incorporate this decadent piece of procedure in his own rapidly growing court.[1] Since then, there has always been in the English court system a jury for presenting criminals; it was the foundation of the modern grand jury.

There were thus in the reign of Henry II. three clearly distinguishable uses of the jury: the old, non-judicial use, in which the king employed the sworn inquest to get local information; the trial jury in the civil cases which the king was drawing into his courts; the accusing jury. This reign may be regarded as the starting point of the history of the judicial jury in England. Two main changes or developments which appeared soon afterwards have left the institution substantially as it exists to-day. The first of these was the evolution of the trial jury in criminal cases; the second, the process by which trial juries became judges of fact, thus having placed upon them the most responsible function in court procedure.

The need of a jury to try criminals was distinctly felt in Henry II.'s reign. When accusing juries presented murderers and others suspected of serious crimes before the royal courts, the king found himself unwilling to abide wholly by the result of the old form of proof, the ordeal. His object was to rid the country of criminals and he did not propose to be hindered by an antique procedure which shifted the responsibility of finding the truth from man to God.[2] In the same document that made the accusing

[1] The sheriff had occasionally acted as crown prosecutor, though almost all prosecution was left to private *appeal*. One might expect that the problem of prosecution would have been met by building up the sheriff's activities along this line. But a king who instituted the "Inquest of Sheriffs" would be likely to hunt for some other solution. Instead of trying another official or group of officials, he turned to the people. For the bearing of the frankpledge machinery on this matter, see below, p. 181, and for a discussion of the whole theme of the king's use of the people in government, Part III, § II, 4.

[2] See above, p. 23.

jury regular in his courts, Henry instructed his justices in these words:

> Moreover the lord king wills that those who make their law [*i. e. go through the ordeal*] and are quit thereby, if they have a very bad reputation and are publicly and scandalously decried on the testimony of many lawful men, shall forswear the king's lands, to the effect that within eight days they shall cross the sea unless the wind detain them; and with the first wind which they have thereafter they shall cross the sea, and they shall never return to England unless by the grace of the lord king; and there let them be outlaws, and if they return let them be taken as outlaws.[1]

This not only showed dissatisfaction with the ordeal, but gave a hint of what might take its place; it was because a man's neighbours believed in his guilt that he was to be banished; and, when neighbours were regularly and formally summoned to state the facts, there was a trial jury in criminal cases.

It is impossible to give a detailed account of how the new procedure grew. Our knowledge of how criminal actions were conducted in the late twelfth and early thirteenth centuries is scanty. But this was the time of jury growth; the simple but adaptable inquest machinery was being used by the king for innumerable purposes, and it would have been strange if some form of it had not finally met the new want which was felt in the criminal procedure.

[1] Article 14 of the Assize of Clarendon. Men so dealt with were not technically convicted—those convicted by failure in the ordeal were mutilated—but Henry was in effect saying that he was wholly sceptical of the ordeal as revealing God's will and that men regarded as criminals by their neighbours were better out of the country. After ten years' experience in dealing with criminals in his courts, Henry repeated this provision in substance in the first article of the Assize of Northampton. See A. and S., document 16, and W. and N., pp. 56, 57. William Rufus had been equally sceptical about the ordeal, but he did nothing constructive in the way of supplementing or displacing it. "What's that?" cried William, when he heard of certain men who had escaped by the ordeal. "God is a just judge? Perish him who henceforth believes it. In the future let men be answerable to me, not to God." Eadmer, *Historia Novorum in Anglia*, p. 102.

For a long time, there was no conscious creating of a new form of jury, but a tentative use of one or more of the old forms. The presenting juries of the townships have already been mentioned; it early seemed that such juries from the four townships adjacent to the scene of the crime would be a fit body to traverse the presentment which perhaps they had already had their share in making. The duties and methods of a new local official, the coroner,[1] may have furthered, perhaps suggested, this practice. The coroner early ceased to be a justice, even in petty cases, but his right to impanel a jury remained a relic of his original and higher position. He became a keeper of the pleas of the crown,[2] by which was meant that he held preliminary inquiries and kept records that were to be used later by the visiting justices. Now the juries which the coroners had used in such inquests were supposed to have made some investigation of the crimes; they would naturally have been drawn from the adjacent townships, and might be resummoned to give their information to the justices. It was also not uncommon to hold the accusing jury of the hundred to answer concerning the guilt or innocence of those whom they had presented.

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[1] See below, pp. 196–198.

[2] The idea of crown pleas appears for the first time with any distinctness in the reign of Cnute. A small number of serious cases was reserved for the king, but it is hard to find a principle upon which the choice was made, except, perhaps, a consideration of the revenue to be gained from the fines and the limits imposed by the old conception of the king's peace. The Norman dukes also had their reserved cases. In the private and unauthorised collection of laws in Henry I.'s reign, known as the *Leges Henrici Primi*, there is a long and heterogeneous list of crown cases, and, by the large grants of jurisdiction which they sometimes made, the Norman kings of England surely implied that they possessed an inclusive jurisdictional power. With the drawing of the important criminal cases into the royal court in the reign of Henry II., the idea was rapidly taking shape that these crimes, wherever and whenever committed, were breaches of the king's peace. The king's peace was becoming coterminous with the country, and all important breaches of it were crown cases. "I think we may say that from the beginning of the thirteenth century onwards, all causes that are regarded as criminal are pleas of the crown, *placita coronæ*, save some petty offences which are still punished in the local courts, but even over these the sheriff is now regarded as exercising a royal jurisdiction." Maitland, *C. H. E.*, p. 111. For the older conception of the king's peace, see above, pp. 27, 28; for further discussion, P. and M. i., 44–46, and Maitland, *op. cit.*, pp. 107–111.

It was commoner, perhaps, to turn to the jury of another hundred and make it the traverse or petit jury in these cases; but as it would not be likely to know the facts, it became, during the reign of Henry III., the practice to join several juries together and regard them as one trial jury. These were often the hundred jury that had presented the criminal, the jury of some other hundred, and the juries from the four adjacent townships. Probably from early times there was some sense of impropriety in calling upon a man's indictors to pronounce upon his guilt or innocence. Yet it must not be forgotten that the presenting juries did little more than state popular rumour and might thus address themselves to the second duty quite disinterestedly. It was not till 1352 that a statute was passed barring a man's indictors from serving upon the jury that tried him, if they "be challenged for this cause by the party indicted."

The use of a second jury in criminal cases at first merely supplemented the old procedure; it served to bring out more clearly the accused's local reputation. Formally the ordeal was the proof, but if a man came through the ordeal successfully after a jury of his neighbours had pronounced him guilty, it went hard with him. In 1215 the general council of the church in session at Rome issued a decree that the clergy should no longer take part in the ceremony of the ordeal.[1] This met an immediate response in England; the ordeal disappeared forever. This meant no exceptional obedience to the pope on the part of England, though the last year of John and the minority following was a time of great papal influence; but it meant that the English courts had a better procedure ready to put in the place of the old. It was no small thing, however, to make such a complete and conscious change at that early date, and for a long time there is evidence of the perplexities and difficulties that it cost. Although it had apparently recommended itself as a more rational method of proof, the jury was yet regarded as a lower type; it was not of immemorial antiquity like the ordeal, and it rested on a human basis. Largely on these grounds, it appears, grew the idea that it could not be forced upon any one as a method of proof. Except in the recently created assizes, in which a man consciously chose jury trial when he selected his assize, parties to a civil suit had the option of a jury or one of the older forms of trial. These were compurgation or trial by battle, according to the nature of the suit, with many that were settled by documents or witnesses to transactions. In the case of a felony[1] in which a man was brought to trial by the appeal of some individual, jury trial rapidly became an option, sometimes with appellor sometimes with appellee.[2] But when a man was indicted at the suit of the king,[3] that is, presented to the justices or the sheriff by a jury, there was no option left after the ordeal was abolished.[4] The state was confronted by what seemed an insolvable problem; the prejudices just mentioned made it loath to force a man to put himself upon the country, and yet, if he refused to do so, there was no form of proof available. The experiment was tried, in 1221, of forcing jury trial upon notorious felons, but the completeness with which it was abandoned shows how it ran counter to the ideas of the time. The state handled minor suspects, who refused a jury, by forcing them to give pledge or even leave the country; but it was not considered that a conviction had taken place. Thus when suspected felons refused a jury, they remained technically unconvicted and their property, both real and personal, could not be confiscated or their blood attainted; the consequences of their crimes could not be visited upon their heirs. There was thus a strong motive for continued refusal in instances where conviction was a foregone conclusion. In these cases pledge or exile was insufficient; the state could do nothing but keep the men in prison until they consented to put themselves upon the country. There was reason therefore for making the imprisonment as terrible as possible, and from the "strong and hard" prison of the thirteenth century there came by a natural evolution the horrible *peine forte et dure* which was not abolished until 1772.[1] It should be understood that, in the vast majority of cases, those indicted for crime willingly accepted jury trial.

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[1] This was the twelfth ecumenical council, the "Fourth Lateran." The decree did not include the trial by battle, which was, in principle, a true ordeal, for the clergy had no official connection with the ceremonies attending it.

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[1] See Maitland, *C. H. E.*, pp. 110, 229.

[2] The king's courts, during the thirteenth century, were often getting cases that began with appeal as well as indictment. This was through a legal fiction by which the appellor claimed that there had been a breach of the king's peace although no person or place covered by the king's peace was involved. The king's justices did not allow the appellee to call this in question. This made it possible for the appellor to put the whole question at issue upon a jury. On the other hand by Bracton's time, battle or jury was regarded as a regular option of the appellee's.

[3] "The judges began to favour the indictment and to discourage the appeal by all possible means. They required of the accuser a punctilious observance of ancient formalities, and would quash his accusation if he were guilty of the smallest blunder. Still throughout the middle ages we occasionally hear of battles being fought over criminal cases."—Maitland and Montague, *A Sketch of English Legal History*, pp. 61, 62. See further in this reference for an interesting account of the famous Abraham Thornton case in 1818 and the abolishing of trial by battle in 1819.

[4] Compurgation seems to have been practically abolished for serious crimes by the Assize of Clarendon which decreed proof by ordeal. At any rate by the beginning of the thirteenth century it was no longer thought of as a possible resource in such cases.

We come now to the second important matter in jury history after Henry II.'s reign. How did it come to pass that the judicial jury became in England a feature of government by the people, while on the continent the same parent stock brought forth the canonical inquisition, an institution so opposite in character? The early thirteenth century was a critical time for the English jury; the young institution was pliable, and the influences of that time largely determined its future history. It but narrowly missed travelling the road of its continental cousin. The most prominent trait of all early juries was their supposed or actual knowledge of the facts sought; and when juries became a regular part of judicial procedure, one is likely to think that they were nothing more than witnesses and that the justices were engaged in obtaining and weighing testimony. A good many details might be collected from the early practice in favour of such a view, and if the judges had at that time been a little more inclined to deal with the jurors separately, questioning them solely on the facts of the case and keeping to themselves all discretionary functions, there would have been an inquisition in England instead of a jury. But though it may be granted that the early English jury was nine-tenths witness, the one-tenth something else was very important, for it was this which developed. It is the purpose here to inquire what this element was and why it persisted and grew.[1]

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[1] Pressing (with weights "as heavy, yea, heavier than he can bear"), as a means of making a man voluntarily (!) answer "By God and my country" to the question "How will you be tried?", was used as early as 1302, and became the commonest method.

Except in the four petty assizes, where it was an original and necessary part of the procedure, the jury was at first regarded merely as one among other methods of proof. If the litigants chose it, they must abide by the result; and the court would no more have thought of inquiring into the action of the jury than of questioning or criticising compurgation.[2] The thought of the judges was to reach a conclusion by some of the known methods of proof rather than to inquire into processes. They deemed the jury in some respects preferable to the older proofs, but the habit of thought was still too much dominated by the immemorial practice of appealing to supernatural powers in judical matters for rational distinctions to weigh heavily. The older proofs furnished speedy and unequivocal answers; the jury was expected to do the same. It would have been impious to question how God reached the conclusions which he revealed in the trial by battle or the older ordeals; there was little disposition to ask how the jury reached its unanimous answer. It was usually quickly reached; it was the "voice of the country"; the litigants had placed themselves upon the country; it was what was wished. The jurors drawn from a limited district, the neighbours of the parties to the suit, embodied in themselves when they came into court something that would have seemed more valuable to the court, could the comparison have been made, than the product of a rational taking and weighing of evidence. The fact that the jury reached its verdict in its own way and returned a complete and final answer shows that there was likely to be at least a slight judging element in what it did. Moreover the jurors were not to be content with the knowledge of the facts which they happened to have when summoned; they were expected to make inquiries and inform themselves as best they could before coming into court. This entailed some weighing and judging of evidence. They were not mechanical transmitters of fact like modern witnesses, but were embryonic "judges of fact" from the first. Moreover, it should be remembered that at that early time there were scarcely judges, in any modern sense, in some courts where the jury was used. The assembly still judged. The jury was a part of the assembly, put under oath for a specific informing-judging job. It was not so much, as it would have been later, an alternative between a professional judge and a group of citizens, but rather between groups, or between a whole group and part of it. Even the king's justices were often more presiding officers than judges—seeing that the courts did things according to new methods grafted on the old. Thus for this reason also, the *early* establishment of the English jury as a regular part of procedure was determining its character.

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[1] The discussion of this subject is based upon the admirable account in P. and M., ii., 622–627.

[2] But after a suit was ended the defeated party might proceed against the jury through what was known as an attaint. An "attaint jury" of twenty-four passed on the preceding verdict, and if they found it false it was rescinded and the first jury severely punished, usually by fine. Such proceedings were expensive, but were increasingly common in the thirteenth century and show that juries were still regarded as primarily witnesses. Attaint was used throughout the middle ages, or until juries were quite distinctly judges of fact furnished by witnesses in court.

Upon these characteristics depended the triumph, in the course of the fourteenth century, of the principle of unanimity in the jury. Its early position as one among several kinds of proof tended to make it like them; if they spoke unequivocally, the jury must. "The *veredictum patriæ* is assimilated to the *judicium Dei*." Moreover, the jury being the voice of the country, that itself looked towards unanimity. The majority dogma was not clearly formulated, and if the country were to speak, it must be through unanimity.[1] And the judging element favoured a unanimous verdict, for the juror did not have to stand strictly upon his own personal knowledge; he might be persuaded to change his opinion, or he might accept the fuller information of his associates. Here was action and reaction, for the unanimous verdict favoured the judging element: in most instances it could not be reached without discussion and sifting. The judges regarded unanimity not only as the most natural but the most convenient requirement, and often used much pressure to obtain it. There were many exceptions to the rule in early times, but the tendency was decidedly in favour of unanimity, and that as the result of the primitive characteristics of the English jury and the circumstances of its early use in the courts.

It may be impossible to state fully why the traits of the jury just discussed persisted and triumphed over those which at first seemed more obvious and important. Some considerations, however, may be brought forward. England was quite uniformly orthodox during centuries when heresy trials were growing frequent upon the continent. The nature of the crime of heresy led very readily to the separate examination of witnesses and the secret collection of testimony accompanied by torture—an inquisitorial procedure.[2] Had such trials been common in England, the jurors might soon have become mere witnesses, and there would have been in the hands of the state an engine of tyranny instead of self-government. Another and more important consideration is that the possessory assizes were made with a jury as a necessary part of the procedure, and that too a jury tinged with those traits of the older forms of proof that we have been noting. Now these assizes exactly met the needs for which they were designed; they grew very rapidly and struck deep root in English soil. From these, the jury spread quickly but voluntarily into other civil actions.[1] At the critical period of jury history in the thirteenth century, when it was being determined whether it should triumph over other forms of proof, and, having so triumphed, what should be the line of its own development, its necessary use and its character in the possessory assizes were decisive influences. These popular actions were working by their very presence for the spread of the jury, and that a jury like their own. "Much was at stake during those wakeful nights in which the Novel Disseisin was being fashioned."[2] Also dislike of the burdensome Norman trial by battle played its part. But as trial by battle did not exist in England before the Conquest, the other ordeals had had an exceptional spread, so that when they were abolished there was a wide field ready to be filled by the jury.

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[1] Yet to begin with unanimity hardly meant the conscious unequivocal consent of each member of the jury to the verdict; surely there was no thought of unanimity as a punctilious safeguarding of the defendant. It was a *group answer* that was insisted upon. The majority idea was used in the grand jury (which consisted of twenty-three members) before the end of the middle ages.

[2] Juries of neighbours, finding their verdicts in their own way, might always be expected to convict men of murder, theft, robbery, etc., in a reasonable number of cases: but not of heresy, when a district was honeycombed with heretical beliefs.

If, then, juries were to be finally judges of fact and not witnesses, there would soon come a time when true witnesses would be needed. It was far into modern times before the idea entirely disappeared that the jury itself might furnish at least a part of its facts. Throughout the thirteenth and even in the fourteenth century, care was often taken that some of the jurors, owing to the locality or class whence they were drawn, should have information useful in the trial and which they were expected to impart to their fellows. But this had to be supplemented more and more; the apparatus of informing the empanelled jury was developing, and the witness was an important part of it.[1] In the practice of the early thirteenth century, it is possible to see a shadowy distinction between what we should call a juror and a witness; but this was long before they were distinguished in name or consciously placed in separate categories, when, as it has been expressed, the witness served on the jury. But as the jurors became judges of fact, this distinction necessarily grew; it was a century and a half however before it was clearly understood and stated. Of the intervening steps, we know little. Shortly before the middle of the fourteenth century, it was ordered that witnesses, in contradistinction from jurors, were not to be challenged; that witnesses "should say nothing but what they know as certain, that is, what they see and hear," while jurors, placed under no such limitation, were "to tell the truth to the best of their knowledge." This must have ended any serious confusion between the two.[2]

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[1] "Before the end of Henry III.'s reign it is a common incident in most kinds of litigation that the parties agree to submit to the country some question that has been raised by their pleadings." P. and M. ii., 620. It was spreading into such important new actions as waste, writs of entry, and trespass. In both criminal and civil procedure, the *exceptio*—the question about an incidental point of fact brought up in the course of the pleadings—was important in this connection. It was the custom to determine such facts by a jury, and from them the jury advanced naturally to the main questions of fact.

[2] P. and M. ii., 632. "De beneficio principis succuritur ei per recognitionem assisæ novæ disseisinæ multis vigiliis excogitatam et inventam." Bracton *f.* 164b.

In this connection care must be taken not to ascribe to the medieval jury too beneficent and modern a rôle. The jury to-day seems thoroughly democratic; by it a man receives the verdict of his equals; but the state of society made this impossible in the middle ages. Except in the manorial courts, jurors could only be drawn from the class of freeholders and the whole mass of peasantry was below that; in civil actions in the manorial courts, the peasant might have a jury made up in part, or occasionally wholly, of his class, but in criminal cases, which would not be tried in these courts, his verdict was rendered by a class much above him. On the other hand in the case of men of standing and influence in the community, it was hard, owing to the principle of unanimity, to obtain from a jury an adverse verdict in any serious matter.[1] Yet a great thing had been done; a great experiment in self-government was being unconsciously tried. There are five general steps in judicial procedure: first, (in criminal actions) the prosecution; second, ascertaining the facts; third, declaring the law; fourth, the judgment; fifth, carrying the judgment into effect. A little reflection will show that the first two of these present new facts in each case and entail great responsibility, while the last three (especially in consideration of the circumscribed field in which court judgments could operate in the middle ages) were relatively mechanical. Regarding the judiciary as the most fundamental side of government, it is fair to say that the two most vital steps of government's most frequent and important activity were placed in the hands of representatives of the people. Why did the kings do this? The answer must be drawn from the detailed account of the jury's institution and growth in England; they found it a means of building up their own courts and revenue, they disliked the old forms of proof, they distrusted the sheriffs, and they found that the thing worked. There was in England the right kind of stuff out of which to make juries.[1]

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[1] But the fact that throughout the middle ages a man being tried for crime could not employ counsel or compel unwilling witnesses to testify in his behalf, shows how slowly the old conception of the jury died.

[2] For discussion and references on this important change, see Thayer, *Evidence*, pp. 100–102. After the institution of justices of the peace (see below, pp. 198–206) summary trial without jury began to be given them in a number of petty cases. This began in the 15th century and was much extended in the 16th. It was being recognised that jury trial was too cumbersome for a number of the lesser offences that had earlier received it.

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[1] "After some hesitation our law had adopted its well-known rule that a jury can give no verdict unless the twelve men be all of one mind. To obtain a condemnatory unanimity was not easy if the accused was a man of good family; one out of every twelve of his neighbours that might be taken at random would stand out loyally for his innocence. Bribery could do much; seignorial influence could do more; the sheriff, who was not incorruptible, and had his own likes and dislikes, could do all, since it was for him to find the jury." Maitland and Montague, *Sketch of English Legal History*, p. 65. Maitland believed that if it had not been for the drastic calling of jurors to account by king and Council, in the time of the Tudors and Stuarts, the institution might not have survived. As to the grand jury it has undergone very little change since the end of the 15th century. See Maitland, *C. H. E.*, p. 212.

With this discussion of the jury, is concluded the account of the new business and the new methods which the king's court was assuming in the late twelfth and early thirteenth centuries. But the increased business had an important influence upon the court itself; its old structure and organisation had become insufficient, and it is necessary to consider next how it was adapted to the new demands. The king had been making the judicial business of the country his own; an important specialisation of his court for judicial business resulted; a court in the modern sense of the word was made out of the king's court, where the word court has its broader and earlier meaning. Certain specialisations of this court in the reign of Henry I. have been noticed.[2] These were all revived at the beginning of Henry II.'s reign, but no one of them was a thorough-going judicial specialisation. But during his reign and the century following, two of them, the itinerant justices and the Exchequer, underwent a development along judicial lines that transformed them.

The Assize of Clarendon marks an important turning point in the history of the itinerant justices. After that, the criminal cases that were being drawn into the king's court[3] and the new possessory actions formed the principal part of their business, and one hesitates no longer to call them judges. They might not now all be members of the central court, but some of each group almost always were. In either case, however, they were doing, as formerly, king's business; the court which they held was his court. Long after Henry II.'s time, they did king's business of a non-judicial character, often along with their judicial work, but it is not surprising that in this legal reign the English *missus dominicus* was becoming a specialist in judicial matters. If a constantly increasing number of actions were to be tried in the king's court, that court must become to some extent itinerant, unless almost all litigants and juries were to bear the burden and expense of long journeys. This new need seized upon the already existing itinerant justice system, and the circuit court developed. After the Assize of Northampton, which in 1176 still further extended the work of the itinerant justices, they were increasingly used to the end of the reign. There was little regularity in sending them out, in the extent or location of their circuits, in their personnel, or in the contents of their commissions. The king seems to have apportioned his increasing business between his court at Westminster and his courts in the localities as its varying amount and nature from year to year or month to month suggested.

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[1] The Plantagenet kings were seeking to develop the jury in much the same way in Normandy and Anjou, probably not much in Aquitaine. But the royal courts grew more slowly in these less homogeneous provinces, no common law was growing, and when they were lost to England they gradually slipped back into the condition of the rest of France, where the old sworn inquest had been changing into the canonical inquisition. But "when all has been said, the almost total disappearance in France of the old *enquête du pays* in favour of the *enquête* of the canon law, at the very time when the *inquisitio patriæ* is carrying all before it in England, is one of the grand problems in the comparative history of the two nations." P. and M. ii., 604.

[2] See above, pp. 139, 140.

[3] *Ibid.*, p. 162, note 2, on how cases begun by private appeal as well as by jury presentment were getting into the king's court.

The century following Henry II. was still a time of experiment and gradual development in the itinerant justice system, or the system of commissions as it may perhaps be more properly called. There came to be two main classes of commissions, those of a minor character and the general iters. The more important minor commissions were for gaol delivery or the possessory assizes. The individual commission of gaol delivery applied to a specific gaol named therein; it did not order an inquiry through a jury of presentment, but dealt simply with those persons found in the gaol at the date set; it might, however, involve the trial of some of the greatest criminal cases. This commission was often entrusted to knights resident in the shire concerned, in which case, of course, there was nothing itinerant about it. For the possessory assizes, commissions were issued often. In Magna Carta it was provided that they be held four times a year; but the provision was changed to once a year in the reissue of 1217, and this was long the rule. The Charter also provided that these assizes be held in each county by two justices sent from the central court together with four knights of the county chosen by the county court; but this rule was not strictly kept, and the thirteenth century tendency was to entrust this work more and more to professional justices. However, the use of knights in the administration of royal justice was growing in other directions and was a characteristic and important development of this period. The local gentry in England were destined, in one way or another, to do much governing.[1]

The general iter of this period, the iter *ad omnia placita*, was in a special sense *the* iter or eyre. Of this, the famous iter of 1194 may be taken as an early example and prototype.[2] The justices who were sent out on such visitations had tremendous commissions; they not only tried all sorts of cases, but were still, as in the earlier time, collectors of revenue, and might be charged to attend to any kind of king's business. Henry III. got a great revenue by their means. They put local juries on oath for a great variety of purposes, their visitation being a prolonged inquiry into every matter that could possibly concern the king. The hundred juries—the "dozens," as they were called—who must report every least breach of the law since the last eyre, were specially burdened and ran every chance of fine or imprisonment for mistake or lapse of memory. But scarcely a man in the county, of whatsoever class, could have missed some kind of duty, expense, or responsibility in these prolonged visitations. The later scheme, by which business might still go on at Westminster for a certain locality after a commission had been issued for that locality, had not yet been thought of. The moment a commission was issued, all business included in the commission stopped for the entire circuit to be visited; and if commissions were issued for all England, all the business named was forthwith suspended at the centre. This lead to a glut of work in the local sessions of the justices and greatly increased their length. Thus these general visitations were altogether formidable and burdensome[1]—"those tedious old iters," Maitland calls them. They became one of the standing grievances against Henry III., and the people were outspoken in their complaints. It became a sort of unwritten law in his reign, apparently as a result of the general outcry, that they should be made only once in seven years. This remained the practice until they ended in the next reign.

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[1] See below, pp. 198–206, 351–357.

[2] A. and S., document 21.

One of the great legal reforms of Edward I. had to do with the itinerant justice system; the Statute of Westminster II., 1285, inaugurated a new régime that in some of its principal features has lasted to the present day. It reorganised one of the minor commissions, that of Assize, and instituted the *nisi prius* principle. The commission of Assize replaced the old general iter, and the justices were relieved of the mass of non-judicial business which had so long been a relic of their earliest history. This commission had been that for holding the possessory assizes and now included only cases concerning real property, but before the end of Edward III.'s reign it had expanded so as to include almost every action, criminal as well as civil. However, the very rapid contemporary development of the justices of the peace[2] so reduced the work of the itinerant justices that their visitations were never of the old prolonged or burdensome character.

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[1] A most vivid account of the general eyre, especially its burden upon the people and their involvement in local government, is to be found in W. C. Bolland's little book, *The General Eyre*. One chronicler, writing of the Cornwall visitation of 1233, makes the picturesque statement: Eodem anno fuerunt itinerantes justiciarii in Cornubia; quorum metu, omnes ad sylvas fugerunt. *Annals of Dunstable*, p. 135.

[2] See below, pp. 198–206.

Through the *nisi prius* principle the people were relieved in another way. The most burdensome thing in the administration of central justice had been making juries come to Westminster. It was now ordered that the Assizes should be held three times a year (later this was changed to twice, in the northern counties once), and when a question of fact arose in the pleadings in a case that had been placed on the docket at Westminster, an order was sent to the sheriff of the county concerned to have the jurors at Westminster on a certain day *unless before* that day the justices of assize had come into the county. As they went twice a year they would regularly come before the day named, and the question of fact would be tried "at *nisi prius*." The judgment, however, except in many cases later specified by statute, would be rendered in the central court where the case had originally been placed on docket. With these changes, the system of commissions assumed the chief features that it has since borne. Its history in the thirteenth and fourteenth centuries shows how rapidly the king's courts were absorbing the judicial business of the country and how necessary it was that much of that business be done in the localities.

The second of the king's-court specialisations of Henry I.'s reign, which began to receive important judicial development in the reign of his grandson, was the Exchequer. This institution had little about it at the start that suggests a court—the more permanent group of royal counsellors, especially those becoming skilled in finance, sitting spring and fall before the chequered table to balance the king's accounts with the sheriffs. It was an administrative body of a special sort, a financial bureau.[1] In the course of two centuries, it became also a court. The early Exchequer controlled the king's treasure; nothing could be paid out without its direct order or unless it saw that a proper authority were ordering the expenditure, for there was no treasury department distinct from it.

[1] See below, pp. 306–312.

It received all moneys due to the king;[1] at Easter and Michaelmas, the sheriffs made their reckoning with this body for all sums due from their respective shires and had their accounts audited. It dealt with the king's debtors. It was through a development of this last function that it first did judicial work. In dealing with debt cases, it developed a summary procedure peculiarly its own; while aiming to deal impartially between king and subject, its position as guardian of the king's financial interests made it especially careful that the king should receive his due. It could also entertain the case of one who had a claim against the king. The king could not be sued, but king and counsellors might accept the claimant's petition that the case be investigated. This was an extension of the Exchequer's judicial work, and it was supposed to associate with itself the two chief justices when questions of law were involved. After it had to all intents and purposes become a court of law, its administrative work and its traditions hardly allowed it to be so considered; the Barons of the Exchequer knew the "course of the Exchequer," not the common law. But finally, despite this supposition, it began to entertain cases between subject and subject, and thus did violence to any existing theory of its functions. These cases were for the most part debt cases, and the persistence with which they were taken to the Exchequer, rather than to the law courts where they belonged, is only to be explained by the benefit derived from the speedy and severe methods which the Exchequer had worked out in collecting the king's debts.[2] In the reign of Edward I., the Exchequer was forbidden by statute to accept such cases; but the prohibition seems to have been little heeded, and, partly by the use of legal fiction[1] and partly by the express permission of the king, it drew to itself more and more of the common pleas.[2]

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[1] This was not true later; in the thirteenth and fourteenth centuries large sums were received directly by the "wardrobe." See below, pp. 317, 318.

[2] A class of cases, semi-judicial in character, brought often, but not exclusively, to the Exchequer was that which related to "final concords" or "fines of land." These usually started as fictitious, collusive suits between parties, one of whom wished to sell and the other to buy a piece of land. By a payment of money a "fine" or final concord was reached and the transaction was recorded by an indenture. This was the end sought by the parties, the authority and security of a record in the king's court when there was no other satisfactory way of recording a real estate transaction.

This change of function was accompanied by a change in personnel. When as in the reign of Henry I., the Exchequer was little else than king's counsellors sitting for financial business, it of course included such great officials as the Justiciar and the Chancellor; but with the increased judicial business of Henry II.'s time, specialisation began. The Chancery, the writ-issuing department, became separated in the reign of Richard I., and both Chancellor and Justiciar ceased to attend early in Henry III.'s reign. As early as Henry II.'s time they were often represented by their clerks. This left the Treasurer as the presiding officer of the Exchequer, and a Chancellor of the Exchequer was appointed as the keeper of its official seal. But more important in showing the transition from the old feudal to the new official régime, is the fact that the king now appointed its members, the Barons of the Exchequer. It was no longer a feudal body or part of a feudal body. It was a group of appointed officials, whose work was rapidly becoming judicial, but a trace of whose feudal origin chanced to survive in their name; they were never called judges, but barons.[3] In the reign of Edward

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[1] The plaintiff usually claimed that he was indebted to the king and was prevented by the defendant from discharging his debt. This brought the case technically within the competence of the court by making it a concern of the king's revenue, and the court allowed the defendant to make no denial of the plaintiff's claim.

[2] The Exchequer also upon occasion acted as an administrative court; it tried collectors who stole the king's money or were accused of fraud. But some of these cases were tried by specially authorised commissioners. See *Transactions of the Royal Historical Society*, 3rd Series, vii., 187, 188. For this point and reference I am indebted to Professor J. F. Willard.

[3] The first recorded appointment of a definite group of persons as "Barons of the Exchequer" was in 1234. The court began to keep plea rolls in 1236. But to the end of the middle ages it was not thought of as so technically and exclusively a court of law or financial bureau as to have lost wholly its early character of a group of royal counsellors or to have been thought of as wholly distinct from the parent king's court or Council. Undoubtedly the jurisdiction in equity which it acquired, or rather revived, in the Tudor period was based on an omnicompetence derived from such origin and continued association.

I., the Treasurer ceased to have anything to do with the Exchequer's judicial business, and a Chief Baron became the presiding officer of the court.[1] With but slight changes, the Court of Exchequer remained as it was organised in this reign down to its absorption in the High Court of Justice in 1873. Early in the seventeenth century, the finance department had become completely separated from it. But it should be remembered that this department is as straight a descendant from the original Exchequer as the court, and that the term Exchequer is as properly applied to it.

It was the great extension of the king's judicial business in the reign of Henry II. and the period following which developed a common-law court out of the original Exchequer. The same cause brought forth the other two common-law courts. The first definite and purposeful move towards the creation of a central court in the modern sense of the word was when Henry II., in 1178, designated from his council or official household a body of five men, clerks and laymen, who were to devote themselves exclusively to doing justice. It was a specialisation;[2] the increasing judicial work could not be left to the occasional and unskilled performance of tenants-in-chief. And yet it was, in a way, subordinate to this very group; it was provided that matters too hard for it were to be brought to the audience of the king and his counsellors. This body of judges became known as the Bench, from the nature of their seat when doing justice. Until the reign of John, there was little further development of the court. This king often had, when travelling, a party of justices in his train, his council in whole or in part, who did justice in his presence *en route*, while the Bench remained at Westminster. Thus arose a distinction between the body of judges who habitually did justice in the king's presence (*coram rege*) and those who remained at the centre and usually did justice without the king. That this distinction was recognised before the end of John's reign is shown by the well-known clause in Magna Carta: "Common pleas shall not follow our court, but shall be held in some fixed place."[1] So many were seeking justice at the king's court that it had become a matter of importance to know where the common pleas, the civil suits between man and man, were to be taken. During the long minority of Henry III., there was no *coram rege* court as distinguished from the Bench at Westminster; but upon the king's coming of age, or very soon after, the same differentiation appeared as in the preceding reign, and from that time there was, besides the Exchequer and the Bench, another central court, scarcely as yet to be distinguished from the council, the characteristic of which was the king's presence. This was the beginning of the Court of King's Bench, a court which quite naturally came to deal with the important criminal cases, the pleas of the crown.[2] As the later medieval kings gradually ceased their peregrinations, this court, like the others, became stationary at Westminster. The Bench always remained the technical name for the court whose main business comprised the civil suits between man and man, but it came to be more generally called Common Bench or Common Pleas. Thus originated the three central, common-law courts, Exchequer, King's Bench, and Common Pleas. Yet these were never quite co-ordinate. Exchequer and King's Bench were gradual unconscious growths from the supreme source of judicial authority, the king and his council, and always kept traces of their high origin. Indeed it was not until about the beginning of Edward III.'s reign that the Exchequer was distinctly a common-law court; it was slow to lose its higher, essentially equitable, jurisdiction. The Common Pleas was much more the creation of a definite time and ordinance and bore marks of inferiority to the other two.[1]

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[1] The Chancellor of the Exchequer also never became a common-law judge; he was connected only with that Exchequer which was a revenue department. An interesting instance of survivals is that the Chancellor of the Exchequer was regarded as technically entitled to sit as a judge with the "Barons," and a newly appointed Chancellor might as a matter of form so sit and hear a few cases. This down to 1875.

[2] It was not a complete specialisation to begin with; any of the five might at the same time be Barons of the Exchequer and attend to various kinds of king's business.

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[1] Yet it is to be noticed that the barons, in this article, did not specify a court but a class of cases. The groups of judges were hardly as yet definable courts.

[2] See above, p. 162, note 2.

To begin with each had its proper business; the King's Bench, the pleas of the crown, including all breaches of the king's peace; the Common Pleas, the ordinary civil actions; the Exchequer, matters touching the royal revenue. This is but a rough statement; really the spheres of the King's Bench and Common Pleas overlapped, and this facilitated the practice of stealing work from the Common Pleas which was begun by the King's Bench and adopted by the Exchequer, for more business meant more money. In the end it came about that while each court had some work all its own, each could entertain any of the common civil actions.[2]

2. **The Displacement of the Old Local Courts by a New Local System of Royal Courts.**—The immediate effects of the Norman Conquest upon the old local courts,

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[1] For a useful diagram illustrating these and other developments of the king's court, see G. B. Adams, *The Descendants of the Curia Regis*, American Historical Review, xiii., 11–15. But see also his *The Origin of the English Courts of Common Law*, Yale Law Journal, xxx., 798–813.

[2] Maitland, *Justice and Police*, p. 35. The differentiation of the King's Bench from what might, at the end of the thirteenth century, be termed the king's council (see below, pp. 296, 297, and note 1) was very gradual. "For ordinary purposes" the King's Bench consisted "of a few professional judges, . . . but at any moment this court can be afforced by the presence of the king, of his councillors, of numerous barons and prelates"; in either form this was the old *coram rege* court. But in the reign of Edward I., can be noted the beginning of the final complete separation of the King's Bench, a limited court of professional judges, from a larger and vaguer king's court or what stood for that at this later date. But when that separation had taken place and the old court had brought forth its third judicial offspring, we find that neither in its smaller nor its larger form, neither as Council nor as House of Lords, had that body divested itself of all its judicial power. And the judicial power which remained was of a higher order than that which it had transmitted. "A court which is to stand above the king's bench is being evolved out of the old court held coram rege."—Maitland, Introduction to *Memoranda de Parliamento*, pp. lxxx.–lxxxi., *passim*. See also below, pp. 208, 209. The passing of the chief justiciar, 1268, (*ibid.*, p. 216, note 3) marked progress in the separation of judiciary and executive. From that time each of the central, common-law courts had its Chief Justice—in the case of the Exchequer known as Chief Baron.

both communal and private, have been discussed.[1] We begin here with the situation as found in the early part of Henry I.'s reign. Private jurisdiction was increasing under the impulse of continental thought. Henry had attempted to correct the irregularities in the hundred and shire courts for which the sheriff had been largely responsible in his brother's time, and the sheriff, a royal officer, had become the only presiding and constituting official in those courts. This last fact, taken in conjunction with a livelier conception of the king as the source of law and the masterful character of the post-Conquest sovereigns, leads one to look for an important change in the local courts. There are clear indications that the change was beginning under Henry I.

There were meetings of the county court that required such full attendance and entertained such a class of cases as make it clear that they were different from the ordinary meetings. Their composition was strikingly like that of the later itinerant justice courts; cases in which the king was specially concerned were tried there, and also cases between the vassals of different lords, such as on the continent would usually have been carried before a suzerain's court.[2] When the king ordered this specially full attendance for doing this kind of business and the presiding sheriff was perhaps more emphatically the king's representative than wont, the shire court had, for the time, become a king's court. It is probable also that in the course of the reign itinerant justices were sent out with some regularity and that such courts were summoned to meet them.[3]

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[1] See Part II., § II., 1.

[2] Such cases might also be tried in the court of the defendant's lord.

[3] Three instances of a king's court in the locality in the reign of William I. have been found. They were summoned by royal writ, justices presided and were distinctly in *loco regis*, the judgment was of the same force as that of the central court; and, while a baronial element and the county court were present, they were not essential to the court's authority, which was centrally derived and royal, not local. See G. B. Adams, *The Local King's Court in the Reign of William I.*, Yale Law Journal, xxiii., 490–510. See also his study of Henry I.'s writ concerning the hundred and shire courts (for the text of this writ, see Stubbs, *Select Charters*, p. 122) and

In the same reign, there is evidence of specially full meetings of the hundred court, held twice a year when necessary, whose main purpose was *view of frankpledge.*[1] This was an examination of the pledge groups to see if they were full and properly organised, and the special meetings of these courts held for such purpose and over which the sheriffs presided must be considered essentially king's courts; they were to enforce a piece of police machinery devised by the king. Thus during Henry I.'s reign, both shire and hundred courts were, upon occasion, king's courts, and were always potentially such.

By the Assize of Clarendon, 1166, a new power was given the sheriff, the use of the presenting jury; and it has been suspected that Henry II.'s adoption of this procedure in his own courts, was suggested by the frankpledge system. "The machinery was apt for the purpose; the duty of producing one's neighbour to answer accusations could well be converted into the duty of telling tales against him."[2] The sheriff used this jury in the semiannual meetings of the hundred court, where view of frankpledge was held, criminal cases were initiated that were to be concluded before the itinerant justices, and many minor criminal matters disposed of. This court came to be known as the sheriff's *tourn.*[3] It was his semiannual visitation of the hundreds of his shire for the purpose of criminal jurisdiction. In such a court, where he was as distinctly a royal justice as the itinerant justice was in his court, the sheriff naturally assumed more of the judging function; he was not a mere presiding officer or one who looked out for the royal interests in a court that derived its authority from a source outside the king, as he had been in the old communal courts. This being the character

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some related passages in the *Leges Henrici Primi* in *American Historical Review*, viii., pp. 487–490.

[1] For the origin of frankpledge, see above, pp. 67–69, 109, 110.

[2] Maitland, Introduction to vol. ii. of the *Selden Society Publications*, p. xxxvii.

[3] The word *tourn* or *turn* was not, until after the thirteenth century, used as a sufficient description of the court; it was *Curia visus franciplegii domini regis apud B. coram vicecomiti in turno suo.*

of the *tourn*, it naturally became a court of record like the other king's courts. By this is meant that it kept a record of its proceedings and judgments, which could thus be used as precedents.[1]

The invasion of the old local court system by the king's jurisdiction has become sufficiently marked, as we reach this point, to make it appear certain that the former will finally disappear. The relations of the two were very confused during the next century and a half; and this makes it necessary here to distinguish and summarise the later history of the old system, as far as it is possible to do so, before continuing the discussion of the new system which the king was putting in its place. The last epoch in the history of the shire court, the hundred court, and the private courts will be considered, taking each separately and in the order named.[2]

By the end of Henry II.'s reign, the shire court seems to have met much oftener than twice a year, its custom in the Anglo-Saxon period. Henry I. had decreed semi-annual meetings, but had in mind the occasional necessity of greater frequency. The increase of business, which resulted from a more rigid enforcement of justice and more use of the local courts by the king, made the exception the rule by the end of the twelfth century. By that time also, by the use of commissions, the shire court, when summoned for certain specified kinds of business, was changed into a king's court,[3] and as such forms no part of the present subject. By the system of commissions, the old communal court was shorn of much of its jurisdiction. The itinerant justice and the sheriff in his *tourn* were absorbing criminal justice, and the old courts' civil jurisdiction was being eaten into by the possibility of evoking cases into the king's court by writ. The enormous popularity of the possessory actions, which could only be brought in a royal court, made the work of the shire court seem small; and as these actions often gave rise to corresponding proprietary actions, they constituted a positive drain upon the old court.

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[1] The old local courts, both public and private, began to imitate the king's courts and keep records about the middle of the thirteenth century, a half century after the kings' courts began the practice. These records, of course, had no public authority.

[2] No clear and detailed account of the steps by which this older jurisdiction waned is possible. The further it is traced, the more scanty and obscure does the information become, a proof in itself of the steadiness with which it declined.

[3] See above, pp. 142, 180.

In Henry III.'s second reissue of Magna Carta, 1217, there was a regulation that the shire court be held monthly, the language implying that it had been held oftener.[1] It was becoming distinctly a court for the lesser civil cases, held at frequent intervals for the accommodation of the people.[2] In it, the old procedure, compurgation, survived; it did not adopt the jury as did the private courts. It used jury trial only when the king's court sent some case into it in order that it might be tried in the locality. The shire courts clung to the old procedure because the dwindling number and importance of their cases hardly made it worth while to attempt anything new, but the result was undoubtedly a hastened decline. No one was interested in their survival. They were the courts of the people, and the people were finding it more to their advantage to get their cases tried in the king's courts.

A further weakening resulted from a decreasing attendance. Suit of court had always been regarded as a burden and attempts had been made to avoid it; now there was no need of enforcing it so rigidly as in times past. The Statute of Merton, 1236, made it no longer necessary that all freeholders who owed suit of court should attend in person; they might send substitutes. Some of the greater landowners, who had now little concern with this court, were attempting to withdraw from it entirely, and during the thirteenth century many of them, especially those who represented great religious houses, purchased or were freely granted charters of exemption. Some simply stopped coming and, in course of time, claimed and obtained exemption through prescription. Thus by the late thirteenth century, the shire court was for small cases and small people.

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[1] Stubbs, *Select Charters*, p. 343.

[2] "It entertains some of the initial proceedings in criminal cases, but for the more part it is a civil, non-criminal court; it has an original jurisdiction in personal actions; real actions come to it when feudal courts make default in justice; cases are sent down to it for trial by jury from the king's court."—P. and M., i., 530.

A clause of the Statute of Gloucester, 1278, was so interpreted as to make the cases grow still smaller.

> The clause in question seems on its face to have quite another object; it says that none is to have a writ of trespass in the king's courts unless he will affirm that the goods taken away were worth forty shillings at the least. This seems to have been construed to imply a very different rule, namely that no action for more than forty shall be brought in a local court.[1]

By 1290, this had become law, and, as money decreased in purchasing power, the number of cases brought before a shire court grew steadily less. By the end of the fifteenth century, its judicial work was of little importance; yet it continued into modern times a court for petty civil suits. But no statute brought this side of its activity to an end or changed the limitation set in 1278 until the erection of the new county courts in 1846. The shire court had always had some functions that were not judicial, and it lasted for the purpose of electing such local officials as coroners and verderers and, a far more important matter, the knights to represent the shire in Parliament.[2]

Much that has been said of the process by which the shire court ceased to be a judicial body applies to the hundred court, but there are some distinctive points in the latter's history. By Henry II.'s time, the hundred court was also meeting more frequently than it had before the Conquest or for some time after; it was probably meeting every two weeks. In 1234, Henry III. sent out orders to his sheriffs that it should be held every three weeks. This change was probably owing to a decrease in business which resulted from the same forces that were weakening the shire court. The hundred court came to be known as Curia Parva Hundredi, apparently in contrast with the sheriff's *tourn*. Its business, at the end of the twelfth century, was confined to petty civil cases.[1] The statutes of Merton and Gloucester had the same effect upon its make-up and competence as in the case of the shire court.

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[1] Maitland, Introduction to *Select Pleas in Manorial Courts*, p. lvi.

[2] The freeholders no longer attended when it was acting as court of law, the sheriff or his deputy constituting the court. The freeholders went only when members of Parliament were to be elected.

But another process greatly hastened the hundred court's extinction. Before the Conquest, the jurisdiction over many parts of hundreds and over some whole hundreds had passed into private hands, though there was little consciousness of this change.[2] After the Conquest, the process went on more rapidly, the country was covered with manors, and, by the end of the thirteenth century, little was left of the old hundredal jurisdication. Petty civil cases for all classes could be taken care of by the private courts and the shire courts; and, moreover, the interpretation placed upon the Statute of Gloucester was carrying an increasing number of small suits straight to the king's courts. In fact, this went so far that, in course of time, it produced an unfortunate condition of things; while there came to be a satisfactory provision for local criminal jurisdiction, far too many civil cases had to be brought to the courts at Westminster—a great burden to the litigants.[3] Thus the old communal hundred court became a superfluity and soon had no work to do; but no formal act brought it to an end.[1]

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[1] The hundred court's "competence seems much the same as that of the county court, though its powers are confined within narrower geographical limits; but real actions do not come to it, nor do we hear of actions being transmitted to it by the king's court."—P. and M., i., 530.

[2] See above, pp. 40, 41.

[3] Only in part of these would the *nisi prius* principle (see above, pp. 173, 174) work any relief. The slight civil jurisdiction which the justices of the peace (see below, pp. 198–206) acquired was negligible; these amateur

Before speaking of the decline of the second class of local courts, those in private hands, a word should be said of the borough courts.[2] The boroughs had been steadily acquiring privileges during the twelfth century, and their courts were flourishing. These courts were destined, in the course of time, to become assimilated, in a general way, to the new royal, local system, and were to be permanent in all the more important boroughs. But until they had thus gained some common characteristics, it is hard to generalise about them.[3] They still corresponded loosely to the hundred courts, but, as has been shown,[4] boroughs had passed under lords, and the extent to which, in the thirteenth century, they were independent of their lords' jurisdiction varied infinitely. The boroughs were naturally suspicious of the newfangled methods of the king's courts, which seemed so potent in extending royal jurisdiction, and were, at this time, holding to the old forms. The more important sessions of the borough courts were probably supposed to be attended by all the burgesses, who were to find the judgments after the fashion of the suitors in the shire and hundred courts. But, as in the shire courts, there was a tendency, from early times, to place this function

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justices, most of whom had no regular legal training, handled criminal cases, even involving the death penalty; but the intricate land law and other technicalities of civil rights were not to be entrusted to them. It was not until the nineteenth century that proper provision was made in the localities for minor civil jurisdiction.

[1] The provision in the County Courts Act of 1867 to the effect that no action, which can be brought in a county court (in the later sense), shall be brought in a hundred or other inferior court that is not a court of record may perhaps be said to mark in a distant way the formal ending of hundredal jurisdiction.

[2] For a full account of the borough courts and the law administered in them, see Miss Bateson's Introduction to *Borough Customs*, vol. ii. (Selden Society Publications.)

[3] "The cities and boroughs—vills, that is, which have attained to a certain degree of organisation and independence—have courts of their own. But of these municipal courts very little can be said in general terms; they are the outcome not of laws, but of privileges."—P. and M., i., 532.

[4] See above, p. 111.

in the hands of a selected group. Where such a group became identified with the body of borough officials, the government of the borough became very aristocratic. To some boroughs was granted, in the thirteenth century, their own view of frankpledge, and this effectually drew them from under the sheriff's jurisdiction.[1]

Like the old communal courts, the private courts also began to be straitened in their jurisdiction by the extension of royal justice in the reign of Henry II.[2] But in their case, there was material for a struggle against the growing power. Justice was profitable, and the lords who possessed it wanted to retain what they had; there was little chance of their getting more. Grants to individuals of judicial authority, as well as of various immunities, were still common in the late twelfth and during the thirteenth century; but the general terms, used in such grants at an earlier time, were carefully limited. As the idea grew that criminal justice was the king's business, and as capital punishment took the place of fine, the amount of such justice granted to individuals grew steadily less. And when the kings began to reflect upon the amount of criminal jurisdiction which some individuals already held, they did not critically study the past in order to understand the matter; they came to the conclusion that, while there might be a kind of civil and petty criminal justice that went with the possession of a manor, this higher kind could never have been lawfully acquired except by definite royal grant.[1]

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[1] Miss Bateson's comment, suggested by the passing of borough customs, can be appropriately quoted in connection with our consideration of the general decline of the old, local system of justice. "The 'dust on antique time would lie unswept' if all the objects of borough ambition had been attained and retained, but, provided the dead past be not restored to tyrannise over us, at a safe distance we may admire its picturesque ruins and half regret the cruel work of dissolution done by the common law in the name of reformation. For the sake of uniformity of worship, many quaint rites have been abandoned; in the great temple of the common law the side chapels are altarless and empty. The justice of the local courts has been ruthlessly condemned as incompetent, provincial, archaic, unprogressive, unable to adapt itself to a new state of society. The old local justice is 'antiquity forgot, custom not known,' because in the system of national justice the general destroyed the particular, no doubt for good reason. And yet for the true understanding of the 'jus et consuetudo regni,' founded upon a rock-bed of unwritten tradition, on general immemorial custom, it may be well to stoop to examine the unworthy particular. In borough custom we have a neglected series of rocks, not primary in antiquity, but full of the signs of life, and the extinct forms which it permits us to handle have a place in the history of the making of the common law."—*Borough Custom*, ii., clvi. (Selden Society publications).

[2] The best account of private jurisdictions in the thirteenth century (with many hints of their earlier history) is to be found in Maitland's Introduction to *Select Pleas in Manorial Courts* (Selden Society Publications).

That this distinction was not clear at the time of the Conquest, nor for long after, it is hardly necessary to state. But it led directly to an act of Edward I. which had a profound effect upon the later history of private courts. In 1278, he issued the Writ Quo Warranto, which demanded by "what warrant" those who were exercising what he was pleased to consider regalian rights were doing so.[2] It was assumed that, if they could not show a written grant from the king, the only means of acquiring such rights in Edward's time, they were to be deprived of them. This roused such protest that Edward abated his demand; he may possibly have foreseen the necessity of this from the first. Those who could show an unbroken exercise of these rights from the coronation of Richard I. were allowed to retain them. But two important things were accomplished. In the first place, any further acquisition of such rights was out of the question; and, mindful of the possibilities of forfeiture and deprivation which a powerful monarchy always possessed, it is easy to see that the exercise of high judicial power by private individuals would, at no distant time, pass away. In the second place, the theory that part of the jurisdiction was exercised by royal grant, and part by manorial right, was so emphasised that it soon became an established principle. This principle resulted in a distinction between courts that must next be examined.

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[1] On the origin of private jurisdiction, see above, pp. 38–41, 77, 78, 105.

[2] In 1274 Edward had sent commissioners throughout the country to collect information about the franchises. This was recorded in what are known as the Hundred Rolls, because it was gathered from hundred to hundred—an interesting parallel to the gathering and recording of the Domesday material. Edward then spent three years in looking the material over and deciding what use he would make of it. His decision, embodied in the Writ Quo Warranto, is in the preamble to the Statute of Gloucester. The barons' pleas or replies to the writ are contained in the Placita de Quo Warranto. This was Edward's first important governmental measure and shows how necessary he thought it was to check the growing feudal assumptions.

Private courts had been quick to adopt the new royal procedure of jury presentment and trial, though the limited number of suitors on some manors interfered with this. For private courts in England were, for the most part, manor courts.[1] A distinction began to be made in the judicial work which the lord did in these courts. He might be doing work analogous to that of the sheriff in his *tourn*, if by grant or prescription it had come to him. But this was criminal jurisdiction and view of frankpledge; it was, according to the view we have just noticed, a strict regality and could only be carried on under royal commission. Hence a court which did this was a royal court, a court of record; it must be sharply distinguished from a court which the lord held as of his own right, which he held because he had tenants. A new and distinguishing name, that of Leet, was applied to it. This name, whose earlier history is very obscure, was probably first used in this connection in the reign of Edward I. From that time, we hear of Leets, the adjective use of the word, as in Court Leet, not appearing until well into modern times. Here, then, was one part of the old, private jurisdiction, modified in its content and procedure by innovations from the king's courts, and finally taken up into, and made a part of, the royal judicial system; the lord's steward who conducted this court now conducted it as a royal officer. Thus it passes out of the field of our immediate consideration; but it may be added that it survived the middle ages, still in a quite vigorous condition, and, though more and more limited by a new and better local machinery, the justice of the peace system, some traces of it are to be seen at the present day.

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[1] The courts of great honours, the feudal courts made up of vassals, had always been less important in England than on the continent; and now they were practically extinct, not only through the invasion of the royal courts and the limitations placed upon grants of justice, but through an important series of legislative acts of Edward I. which checked subinfeudation and tended to break down the feudal hierarchy. A careful study should be made of documents 39, 40, 42, and 45 in A. and S. For a discussion of these acts, see Stubbs, *Constitutional History*, § 179, *passim;* also Medley, *English Constitutional History*, pp. 313, 314.

While the Leet was, in theory, a jurisdiction quite separate from that which the lord possessed in his own right, it was customary to exercise both in the same manor court. It now remains to ask what was this residuum of truly private jurisdiction and what was its fate. It is heard of under the name of Court Baron,[1] a name that came into common use at the same time as Leet. It follows from what has been said of the Leet that the Court Baron had a civil jurisdiction. Now the typical manor contained both freemen and villeins, the freemen usually being in a marked minority. Thus the Court Baron, as had always been the case with manor courts, was made up of these two classes. A distinction between them had appeared in the procedure; it seems to have done no violence to the idea of judgment by peers for inferior to be judged by superior, but superior could not be judged by inferior—villeins were judged by freemen and villeins, freemen only by freemen. But now something had arisen which farther distinguished the classes in these courts; it was the increasing use of the jury there. The lord could, by his own authority, make his villeins take oath as jurors; but the jury was a royal institution, and by the accepted theory of this period, no one could do the same by freemen without a royal commission.[2] This split in the personnel and procedure of the Court Baron was soon reflected in nomenclature; the Court Baron (in a narrower sense) was the lord's private court for his freemen, while the Court Customary, that which administered the custom of the manor, was his villein court.[1]

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[1] The significance of the word *baron* in this connection is not at all clear. The terms by which private jurisdictions were ordinarily known in earlier times were Libera Curia and Halimote. The former usually indicated the higher judicial authority of a lord, but did not signify a court of freemen as opposed to unfree. The latter, lasting on from Anglo-Saxon times, probably meant hall-court, thus distinguishing the court held in the hall of the manor from the old open-air courts of hundred and shire.

[2] This was laid down as law in article 18 of the Provisions of Westminster, 1259 (see A. and S., p. 66), and was embodied in the confirmation of these Provisions known as the Statute of Marlborough, 1267.

The later history of these two courts was not at all the same. The Court Baron soon became decadent. The fact that the king's courts were so desirable and possible a place for freemen to bring an increasing variety of actions was, of course, the main reason for this. But there were, besides, a number of causes which developed in the middle and latter part of the thirteenth century.[2] A change in the law of distraint, which made it possible for a lord to distrain his tenant for rents or services without judgment of a court, made his own court of less value to him; for that had been the place where he could most readily obtain such judgments. In 1285, the lord was given an action in the king's court which made it possible for him to eject his freehold tenant for default of service. The forty-shilling clause in the Statute of Gloucester had, through its peculiar interpretation, the same effect in limiting the competence of the Court Baron that it had in the case of the communal courts.[3] But perhaps the most decisive matter was the threshing out, in the thirteenth century, of the question whether a lord's court should be a court of appeal from the courts of his vassals. Such appeal had evidently been the practice in some countries and there was clearly a struggle. But the lesser vassals were opposed to it and so was the king. Bracton argued somewhat uncertainly about it on the basis of the wording of the writ of right,[4] which told the lord to do right in his court and that if he did not the sheriff would. This implied that, in default of justice, the case had been taken immediately from the court of first instance to the king's court. But the writ of right had to do with only one class of cases, albeit a very important class. In the Provisions of Westminster, however, is found a statement which covered the matter broadly and conclusively: "None but the king from henceforth shall hold pleas in his court of a false judgment given in the courts of his tenants; because such pleas do especially belong to the king's crown and dignity."[1] "We may regard this as a turning point in the history of the feudal courts. If a great baron had been able to make his court a court not merely for his immediate tenants but also a court with a supervisory jurisdiction over their courts, it would have been worth his while to keep his court alive; it might have become the fountain of justice for a large district. But a court merely for the suits of his great freehold tenants, some dozen or half-dozen knights, was hardly worth having and became less worth having as time went on."[2] There were, of course, many lords, whose freeholders were not knights having manors and hence courts of their own; with them this matter of appeal has no concern. For the reasons enumerated, then, the Court Baron, the civil jurisdiction which lords, big or little, had over their freehold tenants ended long before the close of the middle ages. Something approaching it was perhaps occasionally used in connection with the jurisdiction over villeins.[3]

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[1] A lawyer's theory developed that in the Court Baron and Court Customary the assembly judged and the lord's steward merely presided, while in the Leet the steward judged. But probably this distinction was not much adhered to and the practice of the individual manor was likely to be determined by its own tradition.

[2] Maitland discusses all these causes in his Introduction to *Select Pleas in Manorial Courts*, pp. lii.–lx.

[3] See above, pp. 184, 185.

[4] For the origin of the writ of right, see above, pp. 142, 148.

The villein court, the Court Customary of the manor, lasted much longer. But forces were at work in the fourteenth and fifteenth centuries that were undermining it.

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[1] A. and S., p. 66. This was in 1259. The words *false judgment* are important, for it was by enforcing the principle here stated that progress was made towards building up the modern conception of appellate jurisdiction. For an account of the origin of appeal from court to court, see P. and M. ii., 664–669.

[2] Maitland, Introduction to *Select Pleas in Manorial Courts*, p. lix.

[3] It must be remembered that the Court Customary, the villein court, was for those who held by villein tenure whether personally villeins or not. On divergence of tenure and status, see above, p. 95.

It has been seen that the outward mark of unfreedom in the case of the villein was that he could not bring an action in the king's courts, and that these courts came to their conclusion upon an individual's status by ascertaining the degree of uncertainty in his service.[1] Two changes,[2] which began in the thirteenth century, so fundamentally modified manorial conditions in the two following centuries as to do away with this uncertainty of service. The first was the commutation of payments in kind and labour to payments in money. The increasing use of money as a medium of exchange made it possible for the lord to give something for labour other than land, and for the tenant to give something for land other than labour. A man could leave the manor with some chance of placing himself more advantageously elsewhere; at least, he could sell his labour where he could get the most for it. This tended to break up the manorial economy and to make labour free. Fugitives from manors increased; and such fugitives, if no proofs were brought to the contrary, were always accounted free before the king's courts.[3] This rise in the position of the servile classes was favoured by the Black Death of 1348, which, for a time, placed the peasantry upon the right side of the labour market, and possibly to a slight extent by the peasant revolt of 1381. The growth of copyhold tenure was a partial reflection of this change.[4] This tenure certainly looked toward that definiteness in the kind of service to be rendered from day to day which was the touchstone of the royal courts in determining the free status of him who sought remedy in them. But the tenure still retained some servile characteristics, as, for instance, in the form of alienation; and when, a century or more later, it came to a question of the lord's right to evict his copyhold tenant, the king's courts usually upheld that right.[1]

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[1] See above, pp. 94, 95.

[2] These changes were caused mainly by economic and social forces that can not be considered here. See Cheyney, *The Disappearance of English Serfdom*, The English Historical Review, xv., 20–37; Page, *The End of Villainage in England;* Gray, *The Commutation of Villein Services in England Before the Black Death*, English Historical Review, xxix., 625–656; and for some illustrative documents, W. and N., Problem IV. (*A Fourteenth-Century Labor Problem*).

[3] See Frances G. Davenport, *The Economic Development of a Norfolk Manor*, 1086–1565.

[4] In copyhold tenure, instead of the service being based upon the memory of man, an entry of the service was made upon the manor roll, and ordinarily a copy of this, in the nature of an indenture was placed in the hands of the peasant.

The second change was the lord's parcelling out of his demesne into leases at a money rent. Where this was done, the lord ceased to be an immediate employer of labour. The labour service of his villeins and all the petty litigation and consequent fines connected with it—an important part of the manor court's work—ceased to be of consequence to the lord. He was becoming pure landlord. "That fundamental relation between the lord and the villein, that the former could force the latter to stay on his land and work for him, was now a relation without special interest or value."[2]

It should be constantly kept in mind in connection with these two changes that the royal courts favoured liberty, that is, they sought to draw to themselves as much litigation as possible. When the question of villein status was raised, the burden of proof rested upon the lord, and it was usually a considerable burden; the kind of proof to be accepted was limited and the court was strict. The Court Customary was thus being weakened along two lines. Economic changes in the manor were so modifying society and the relations of lord and peasant as to remove its *raison d'être;* as it became less and less a source of income to the lord, he would cease to strive to maintain it. Secondly, the all-absorbing royal courts were ready to take advantage of every change which might be construed as adding to the ranks of freemen, and thus of possible litigants. There were other ways in which individual villeins became free in the later middle ages which it is unnecessary to discuss here. Only a glance at the changes which affected the whole class has been attempted. The Court Customary did not die suddenly; it was decadent at the end of the middle ages, but had some importance well into modern times. However, the forces which were to bring it to an end have been seen in full operation in the fourteenth and fifteenth centuries. With this court is completed the list of the older local courts which fell before the royal system. It remains now to finish the consideration of the attempts of that system to put into the localities something that could work in harmony with itself, and that could furnish that local administration of justice which, in some form, is always necessary.[1]

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[1] This was certainly a denial of the free character of the tenure as such. But there were decisions in 1467 and 1481 to the effect that a copyholder could bring an action against his lord if evicted contrary to the custom of the manor. This was to recognise manorial custom as part of the common law enforcible in the king's court, and cut down the business of the Court Customary. The occasion of the evictions, whose number has probably been greatly exaggerated, was the enclosing of large tracts of land for sheep raising. This use of land was found increasingly profitable in the late fifteenth and early sixteenth centuries. After this particular motive for seizing copyhold land subsided, the nature of the tenure ceased to be a burning question, and copyhold served, in most essentials, as a free tenure. The rapid decrease in the value of money resulting from the development of Mexican and South American mines made the money payments of the copyholder trifling and he finally became about as much an owner of land as the freeholder. But he could not vote for the knights of the shire who represented the county in Parliament; from 1430 to 1832 this right belonged only to the forty-shilling freeholders (see below, p. 390). During the last century, this tenure has been rapidly disappearing.

[2] Cheyney in *English Historical Review*, xv., 36. "A legal relation of which neither party is reminded is apt to become obsolete; and that is what practically happened to serfdom in England."

It is essential to any judicial system that much criminal business be done quickly and on the spot. Frequent as judicial iters might become, the king would find it necessary to have resident criminal justices. From what has been said of the sheriff's *tourn*, it might seem that that was destined to meet this need. But hardly had the *tourn* come into existence before the king found that he must have something more and something different. The sheriff was too great a local, landed personage to be entrusted with a power that would have to be extended in many directions as the peace-keeping and administrative activities of the central government multiplied. Henry II.'s dissatisfaction with the sheriffs and the grounds for it are shown in the famous Inquest of the Sheriffs.[1] The situation called for the creation of a local official who should be strictly under royal control and to whom part of the sheriff's work should be given. Such a creation we find in the establishment of coroners in the reign of Henry II. There is evidence of something like a coroner in Henry I.'s time, when occasional mention was made of justices who were to "keep the pleas of the crown." It was in the earlier reign that the conception of crown pleas first became at all clear.[2] Like Henry I.'s other devices, coroners, if there were any, disappeared under Stephen. Henry II.'s coroner was a local justice, chosen probably by the shire court and from the class of knights. His being a justice implies that he tried cases and could empanel a jury to make presentments. If he had not actually tried cases, he could not, according to the ideas of the time, have used a jury. But he also *kept* the pleas of the crown, and this came to be his special work; it meant that he held preliminary hearings and kept a record of local criminal matters for later use by sheriff or itinerant justice. This was his principal work in Richard's reign, as is shown by the well-known mention of him in the commission of the itinerant justices in 1194.[3] This has often been regarded as the order creating the office, but the coroner's previous existence has been proved, and this order was undoubtedly for the purpose of making coroners general throughout the counties and fixing their number and duties. But that the coroner did not cease to be a justice at least until 1215 is proved by article 24 of Magna Carta, which forbad the sheriff as well as the coroner to hold pleas of the crown.[4] The sheriff continued to be a justice in the lesser criminal cases and in civil cases, but the coroner's judging functions became slender and his duties largely those which he has since kept. But there were, for a time, a vagueness and elasticity about them which allowed exceptions and which are a reminder of the original motive in making the office. During the thirteenth century, the coroner held inquests in cases of sudden death or injury, and preliminary hearings in criminal cases in which appeals had been made; his place in the county court was often much like that of the sheriff, and he might try civil cases there; he could even hold the sheriff's *tourn*. But aside from his judicial functions, and of more importance than some of them, was his work as a local administrative official of the king. In this, he supplemented or took the place of the sheriff. In fact, he was often so much like the sheriff that it is hard to see what the distinction was. One thing is certain: the kings intended that these locally elected knights, two or four to each shire, should check the power of the single aristocratic sheriff, under whom there might indeed be more than one shire. At about the same time the choosing of certain juries was taken from the sheriff and imposed on the county court—another royal means of limiting the sheriff and seeking good local service by making the people help in it.

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[1] See above, pp. 180–182.

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[1] A. and S., document 15.

[2] See above, p. 160, note 2.

[3] A. and S., p. 30; W. and N., p. 93: "Moreover, in each county let there be chosen three knights and one clerk keepers of the pleas of the crown."

[4] A. and S., p. 46; W. and N., p. 386.

But the coroner did not wholly solve the local government problem. Before the end of the thirteenth century, local complaints were made about him as well as about the sheriff. Just why limitations were so early placed upon the coroner's judicial activities is hard to tell.[1] Inasmuch as the final solution of the problem was found in groups of local magistrates appointed by the king, one is led to surmise that the trouble with the coroner lay in his elective character, but our imperfect knowledge of the conditions of the time prevents us from understanding why. But the coroner was the king's first experiment in building up a local government in harmony with the rapidly growing central government, and he hit upon knights as the class best fitted for this purpose. These facts, together with the considerable local importance which the coroner continued to have, are reasons for noticing him in this connection.[1]

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[1] The right to empanel a jury which the coroner still has is a survival of that transient twelfth-century phase of his existence when he was a *bona fide* justice.

Besides the local use of knights just mentioned, we have seen their increasing importance on all sorts of juries and their association with justices in holding the assizes; and when gaol deliveries were entrusted to local commissions, knights might have to exercise criminal justice of the highest sort. This last-mentioned use of knights was, as will soon appear, a very interesting foreshadowing. But we have now to consider knights in a new capacity, as *conservatores pacis* or *custodes pacis*, or, without special designation, their use, on certain occasions, for purposes connected with keeping the peace. Here they were clearly supplementing the work of both sheriffs and coroners, and were often regarded as a check upon the sheriffs. The king was still dissatisfied with the policing and general administering of the localities. It is interesting to note how early in the history of the coroners this new use of knights began. In 1195, the justiciar, Archbishop Hubert Walter, issued an edict by which knights were appointed to take oaths throughout the kingdom from all over fifteen years old. By this oath, men bound themselves not to be thieves, robbers, or the receivers of such, to join in the hue and cry, etc.; and malefactors taken as a result of the edict were first to be delivered to the knights and the knights were to deliver them to the sheriffs.[2] In the "writ for enforcing watch and ward and the assize of arms"[3] in 1252, the king assigned two knights to each sheriff, the three to co-operate in taking oaths throughout their shire that proper arms be borne, constables appointed, and other matters looking to the preservation of the peace attended to. By the Provisions of Oxford, 1258, four knights from each county were chosen to keep the pleas of the crown;[1] but, in their case, this function was to be interpreted broadly: they were expected to do almost anything in the way of detecting criminals and preparing cases for the itinerant justices. Equally broad powers, but with more detailed instructions on the use of the *posse comitatus* and the pursuit of criminals, were given to the custodians of the peace appointed in 1264.[2] Such was the increasing need of knights that as early as 1224 the king began issuing writs for what is known as "distraint of knighthood";[3] they were to compel all whose land brought an income of twenty pounds a year, whether they held from the king or others, who "ought to be knights and are not," to receive the insignia of knighthood within a specified time. The evident disinclination to become knights is striking testimony to the many duties of the class. In the early years of Edward I., knights were, upon several occasions, put to uses similar to those just mentioned. In the famous Statute of Winchester,[4] 1285, Edward repeated, with important additions, the assizes of arms and watch and ward; and in the elaborate arrangements for keeping the peace, in the local "constables chosen" and "justices assigned," there was an advance in the royal attempts to devise an effective local government controlled by, and in harmony with, the central.

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[1] A most satisfactory account of the origin and activities of coroners is in Gross's Introduction to *Coroners' Rolls* (Selden Society Publications, vol. ix.).

[2] Stubbs, *Select Charters*, pp. 257, 258.

[3] *Ibid.*, pp. 362–365.

The decline of the sheriff's power kept pace with the increasing local use of knights. The Statute of Marlborough, 1267, exempted from the sheriff's *tourn* all above the degree of knights unless they were specially summoned. Many boroughs were allowed their own view of frankpledge, thus taking an important duty from the *tourn*.

Edward II. continued the use of the new local guardians of the peace, with some enlargement of function on the administrative side. Year after year commissions were issued appointing them until they were an indispensable and regular part of government; and at the beginning of Edward III.'s reign, they were about to receive the powers and organisation which gave their office its completed form. They were appointed by the king, not locally elected. This point must receive some notice here. The coroner failed to supply the *desideratum* in the local government, perhaps because of his elective character. It was natural that he should have been locally elected, for he originated at just the time that the king was learning the wisdom of taking from the sheriff the appointment of certain juries, and assigning it to the county courts. But in the thirteenth century a new method was tried; the king himself, probably from locally furnished lists, appointed the knights who were to be keepers of the peace. And, as far as can be learned, this remained the method, with the exception of a few occasions early in Edward I.'s reign. On those occasions, local election was used, and, it may be added, was often used at other times to fill vacancies when death or other cause suddenly terminated the service of those appointed by the king. The system of royal appointment has been justified by the later history of the justice of the peace. He was a king's official and his court a king's court, a court of record.[1] His appointment by the king seems to have been an indispensable element in securing the satisfactory correlation of central and local jurisdiction and administration.[2]

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[1] A. and S., p. 57.

[2] Stubbs, *Select Charters*, pp. 399, 400.

[3] W. and N., pp. 96, 97; A. and S., pp. 70, 71.

[4] A. and S., pp. 76–79.

After some interruption late in Edward II.'s reign, conservators of the peace were again appointed in 1327; and in 1328 is the first indication of their exercising a real judging function. But, for some time after that, judging was not their ordinary work; they were still "little more than constables on a large scale." In 1330, some of their duties were defined and enlarged and their relations to the justices of assize made clear. After speaking of the justices of assize, the statute continues:

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[1] One among the justices in each county was charged to keep the record; he was the *custos rotulorum*. In the Tudor period, the Lord Lieutenant of the county, who was a sort of honorary head of the justices and who often recommended who should be appointed, was generally *custos rotulorum*.

[2] In the reign of Edward III., Parliament presented some urgent petitions that justices of the peace be elected. There was also a demand that sheriffs be elected. The king firmly and, as it has proved, wisely, withstood these demands.

> . . . also there shall be assigned good and lawful men in every county to keep the peace; and in the said assignments, mention shall be made that such as shall be indicted or taken by the said keepers of the peace, shall not be let to mainprise [bail] by the sheriffs, nor by none other ministers, if they be not mainpernable by the law; nor that such as shall be indicted, shall not be delivered but at the common law . . . and that the said keepers shall send their indictments before the justices, and they shall have power to enquire of sheriffs, jailers, and others, in whose ward such indicted persons shall be, if they make deliverance, or let to mainprise any so indicted, which be not mainpernable, and to punish the said sheriffs, jailers, and others if they do anything against this act.[1]

It is easy to see how such an official would cut into the parallel work of the sheriff's *tourn*, weakened as this court already was. From this time, this last judical stronghold of the sheriff steadily declined until its practical extinction in the reign of Edward IV.[2] It was in 1361 that the judicial work of the keepers of the peace was made regular and important, and in the same year they were first called justices of the peace. An act of that year granted them the power to "hear and determine at the king's suit all manner of felonies and trespasses done in the same county according to the laws and customs aforesaid"; and there was added significantly: "And the king will, that all general inquiries before this time granted within any seignories, for the mischiefs and oppressions which have been done to the people by such inquiries, shall cease utterly and be repealed."[1] By this act they first became really justices. From this time till the end of the middle ages, there was no crime except treason that could not be tried before the justices of the peace. Thus they and the justices of assize were, on the criminal side, doing the same work, and much that had formerly been done by the justices itinerant was now done by these justices resident.[2] It was an awkward situation, and not until after the Tudor period was a serious attempt made to distinguish between the two jurisdictions.

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[1] A. and S., p. 101.

[2] The triumph of the justices over the sheriff culminated in 1494. By statute they were "empowered to entertain complaints against the sheriff as to extortions practiced by him in the county court, and to convict him and his officers in a summary fashion." This kind of summary trial without jury is being given to the justices in a number of cases. "The practise begins in the fifteenth century and becomes very usual in the sixteenth; parliament is discovering that for petty offences trial by jury is a much too elaborate procedure." Maitland, *C. H. E.*, pp. 208, 209.

As the new local courts encroached upon the *tourn's* business of indicting and holding preliminary hearings, the sheriffs became more and more solicitous about their declining jurisdiction and the accruing profits. They were tempted to many abuses, especially the entertaining of accusations made for purposes of extortion. There was an increasing outcry against these misdeeds during the fifteenth century, and in the first year of Edward IV. an act was passed to the effect that in the future

> the above persons [sheriffs and their various deputies] should not have power to arrest anyone, or levy fines by colour of indictments so taken; but they should deliver all such indictments to the justices of the peace at their next sessions of the peace, under the penalty of forty pounds.[3]

On the face of it, this would seem to take away from the *tourn* everything except view of frankpledge, but in after years uncertainty arose as to just what it had been the intention to include in this restriction. It was finally interpreted as applying to felonies and all the more serious crimes, also to new matter made punishable or actionable by statute. In this crippled condition, the *tourn* outlived the middle ages, and the sheriff, who had been a dangerous local power for four centuries and against whom a long line of strong kings had waged relentless war, was fast becoming a minor executive officer in the county.[1]

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[1] A. and S., pp. 127, 128.

[2] This parallelism of jurisdiction and the early popularity of the justices of the peace are illustrated in the petition of the commons, in the oppressive and troublous early reign of Richard II., "that during the war justices in eyre and of trailbaston shall not go on circuit among the said poor commons, but that the justices of the peace hold their courts according to the tenure of their commission."—A. and S., p. 143. Justices of *trailbaston* (first heard of in 1304) were circuit justices specially commissioned to deal with the organised bands of lawless followers and desperadoes known by that name. On the lack of civil jurisdiction allowed to justices of the peace, see above, p. 185, note 3.

[3] Reeves, *History of the English Law*, ii., 10.

The justices of the peace, as judges acting under royal commission, of course used the jury procedure of the older royal courts; but they had to deal with many petty offences which demanded a summary process. The variety of their work led to a distinction in the business and names of their sessions of court. A single justice exercised many police functions and was empowered by statute to deal with a few petty offences. His principal business was to conduct preliminary hearings.[2] Two or more justices could act together in what came to be known as Petty Sessions; they sat usually, but not necessarily, at an accustomed time and place and for a definite part of the county, often the hundred. They dealt with many cases summarily[3] and with some that required jury trial. The chief court held by the justices was, from the fourteenth century, and is still, known as Quarter Sessions. It was, in theory, made up of all the justices of the county; but all seldom attended, even in the early days when there were few justices to the county. It finally became established that two might constitute a legal session. The origin of Quarter Sessions was in an act of 1362

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[1] The sheriffs were much hated in the fourteenth century as exploiters of the counties. They took the counties at a rent and got what they could out of them. This started an attempt by Parliament, evidenced by a series of acts, running from 1354 to 1444, to make the sheriff an annual officer. This succeeded in the fifteenth century and was decisive in the sheriff's decline. He was no longer the military and police head of the county. He carried out the courts' orders, such as seizing property, making arrests, keeping the gaol, and hanging felons. The office became undesirable and much of the work was often left to an undersheriff, for whom the sheriff was responsible. By the seventeenth century it was hard to get men to take the office of sheriff; but they could be, and were at times, compelled to do so. Yet in his low estate the sheriff still kept his ceremonial dignity —"he is the greatest man in the county and should go to dinner before the Lord Lieutenant." On the sheriff's decline, see Jenks, *Government of the British Empire*, p. 326.

[2] That is, committing to prison or letting out on bail before trial, or dismissing the charge.

[3] Below the indictable offences was growing a class of pettier offences which could be tried without jury before the justices of the peace. They were all created by statute.

> that in the commissions of justices of the peace, and of labourers,[1] express mention be made, that the same justices make their sessions four times by the year, that is to say, one session within the utas of Epiphany, the second within the second week of Mid-Lent, the third betwixt the feasts of Pentecost and Saint John Baptist, the fourth within the eight days of Saint Michael.[2]

This court tried the great criminal cases that were outside the competence of the Petty Sessions, and also heard appeals from that court and from the court held by a single justice.

In studying his origin, it has been seen that the justice of the peace, or keeper of the peace as he was first called, was a police officer, a sort of head-constable, before he became a judge; this earlier character he never entirely lost. Another set of functions, the administrative, of which he had always had some, became very important toward the end of the fourteenth century. Much effort was expended in attempts to enforce the labour legislation of that century; the justice became the chief medium of communication between the king and the localities, all minor officials were made answerable to him, and

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[1] These were justices given a special commission to enforce the Ordinance and Statute of Labourers of 1349 and 1351 (A. and S., pp. 114–117). They might or might not be identical with the justices of the peace. After 1368, no separate commission for enforcing the labour statutes was issued; that function was included in the commission of the justices of the peace. In 1427 they were even empowered to fix the legal rate of wages. See Miss B. H. Putnam, *The Justices of Labourers in the Fourteenth Century*. English Historical Review, xxi., 517–538. See also her *The Enforcement of the Statutes of Labourers.*

[2] A. and S., p. 129.

Quarter Sessions became a veritable governing body for the shire.

Until 1439, there was no legislation which bore directly upon the qualifications for this office. Knights had usually been appointed; but there is evidence that men of smaller substance were occasionally justices, for the abuse of the office for purposes of extortion became serious enough to be taken account of by the government. An act of 1439 contained this clause:

> the king willing against such inconveniences to provide remedy hath ordained and established, by authority aforesaid, that no justice of peace within the realm of England, in any county, shall be assigned or deputed, if he have not lands and tenements to the value of xx pounds by year.[1]

This annual value was the old measure of the knight's fee. This fixed the policy of identifying the new office with a class of men above bribery and of consideration and authority in their neighbourhoods. In modern times, the office has become purely honorary; but from the reign of Richard II. until after the close of the middle ages, a fee of four shillings a day was allowed the justices. The number of justices for each county was limited by statute in 1388. This limitation was not strictly regarded, however, and the number became variable with a general tendency to increase.[2]

Thus by the middle of the fifteenth century, England's local, aristocratic system of government had been made, with most of the features which have conditioned its success and fame in modern times. No such system was possible outside of England, for no other country in Europe possessed that peculiar middle class of country gentry. It might seem that the king's depriving the sheriffs of local power and bestowing it in augmented form upon the justices of the peace, was merely breaking down one feudalising and disintegrating element in order to set up another. But the gentry possessed just the degree of approach to the class below and of distinction from the higher nobility to be an instrument for this local work. Knights were too self-respecting and substantial to become petty eye-servants, too small to make any setting up of local authority upon their own private account seem attainable. "It is such a form of subordinate government for the tranquillity of the realm as no part of the Christian world hath the like, if the same be duly exercised."[1]

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[1] A. and S., p. 194.

[2] "Towards the close of Elizabeth's reign no less than fifty-five are enumerated in Devonshire alone. The smallest counties now contain many more than six; while the most numerous magistracy—that of Lancashire—reaches to more than 800. The whole number must be little short of 20,000; but considerably less than half of these are 'active' justices who have taken the requisite oaths and received from Chancery the necessary writ of power."—Medley, *English Constitutional History*, p. 425. Some boroughs early acquired their own justices whom they elected. Where such was the case, it was stipulated in the charter whether the borough was independent of the county justices or whether borough and county justices had concurrent jurisdiction. The borough justices also have their Quarter Sessions. And there are borough coroners.

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[1] Cited from Coke's *Fourth Institute*, p. 170, in Maitland's *Justice and Police*, p. 93. Chapter viii. of the latter work is the best brief account of the county magistracy as it exists to-day. Jenks comments upon the uniqueness of England's local government in his *Law and Politics in the Middle Ages*, pp. 182–184: "The comparative success of England in the matter of local government has given her a unique place among Teutonic countries, if we except, perhaps, Scandinavia. With this possible exception, England, and England alone, has succeeded in reconciling the absolute supremacy of the State with the existence of local independence. While the State in France became a rapacious bureaucracy, tempered only by municipal and feudal disintegration; while the State in Germany died of inanition, and gave place to a crowd of absolute principalities, whose rulers treated their subjects as food for the cannon, or as milch kine for the supply of taxes; the State in England developed into a strong unity, whose elements yet maintained that vivid consciousness of local life which is essential to the existence of a free and self-respecting nation. The State in England has not ruled through feudal proprietors; therefore there have been no hereditary local despots who have defied her mandates. She has not destroyed the old landmarks; therefore her subjects have not felt themselves to be helpless atoms under the heel of a bureaucracy. Her officials have not been a privileged caste of adventurers, speculating in their offices, and exempt from the ordinary rules of law; therefore they have respected the rights of the citizen, and are by him regarded neither with jealousy nor with fear. The State has boldly used the local units as the basis of its own organisation. . . . In England the State has fearlessly left to local control much that a timid State keeps in its own hands—police, road-making, sanitation, education. The result of the whole policy has been to foster, if not to produce, some of the best features of the Englishman's political character; his deep respect for law, his independence in

3. Origin and Early History of Equitable Jurisdiction, Especially the Court of Chancery.—Royal prerogative, the king's sovereign power as exercised in his central court or council, had not, in putting forth such mighty judicial branches as the common-law courts and the itinerant justice system,[1] drained itself of authority or exhausted its ability to create. It has been shown how, in the reign of Henry I., there were two regular manifestations of this central court: the fuller meeting of tenants-in-chief, summoned at the three great yearly festivals and at other times as occasion required, and the small body of officials and barons in attendance on the king, which the increasing business of the central government kept quite continuously in session.[2] The larger body, after the dropping out of the minor barons and a partial change in the basis of attendance, was, in the early fourteenth century, the embryonic House of Lords;[3] while what there was left of the smaller body, after it had thrown off the court system, was the early Council.[4] But in both of these, there remained the undifferentiated prerogative power of the king; in conjunction with the king, either might exercise what would now be distinguished as executive, legislative, or judicial functions. And even at the date named, any conscious distinction between the two bodies themselves must have been slight. One could quite imperceptibly become the other. The smaller had, perhaps, a more official character—certainly there was a large body of officials—but it was attended by such of the prelates and barons as the king wished at his court, and, by a quite arbitrary summons of more prelates and barons, it might become the larger body. While the bulk of judicial business had, of course, gone to the court system,

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the face of authority, his self-reliance, his practical good sense, his willingness to compromise, his sincere though silent patriotism." The lack in continental countries of almost everything which characterises England's local system has led many continental writers to pick out the local magistracy as the most distinctive and valuable feature of the English constitution.

[1] See Part III., § I., 1.

[2] See above, pp. 116–119.

[3] See below, pp. 341, 342.

[4] *Ibid.*, pp. 296–299.

these original bodies still retained the power to deal at first instance with any case, criminal or civil, which the king cared to bring before them. They entertained many cases of a special character, and had, as was natural, a kind of supervisory jurisdiction over the ordinary courts.

While finally ceasing to be an administrative body, the House of Lords carried over from its earlier history, and has always retained, certain judicial functions. When it was the king's feudal court, the king's vassals were judged in it by their fellow-vassals, their peers; in it, as in any feudal court, was judgment of peers (*judicium parium*). In the House of Lords, any English peer has the right to be judged, in capital crimes, by his fellow peers.[1] In the procedure, known as impeachment, which developed late in the fourteenth century, the House of Lords judges and the House of Commons prosecutes.[2] In the same century it was established that the Lords constituted the highest court of appeal for all England,[3] a position they have continued to hold except in a few classes of civil cases which are appealed to the Council. And to the end of the Lancastrian period, and even later, the large number of private petitions of legal right received by Parliament constituted the chief routine judicial work of the Lords.[4]

When the Lords were engaged in this judicial work, they were known by the technical and curious name of

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[1] That is, for treason or felony. The House of Lords constitutes the court and judges both fact and law if Parliament is in session at the time of trial. If not, the king appoints a Lord High Steward who chooses twenty-three peers to act with him; he judges the law and they the facts. After 1688 all the peers have had to constitute the Lord High Steward's Court in cases of treason. A statute of 1422 secured these rights of trial to peeresses. For lesser crimes, misdemeanors, and in civil litigation peers are judged by the king's justices; and in cases of felony their special rights have often not been claimed. The last trial of a peer by his fellow peers was about 1840.

[2] See below, p. 424. For a description of the modern, central judicial system, see Maitland, *Justice and Police*, chs. v. and vi.

[3] As a court of appeal the House of Lords is, more technically, said to have jurisdiction in error. This draws the important distinction between trying the same facts twice (which was repugnant to the English law) and correcting errors in law. Through the attaint jury, however (see above, p. 164, note 2), the same facts were tried twice.

[4] See below, pp. 397, 398, and pp. 414, 415.

"king in parliament"—curious, because it perpetuated an idea derived from the primitive relation of the king and his feudal court, long antedating anything that could properly be called Parliament.[1] But there was also a tribunal called "king in council," and this was the Council, the descendant of the smaller continuous court, acting in its judicial capacity.[2] We have seen that both bodies might, at the beginning of the fourteenth century, entertain any civil or criminal case. While the larger, which was to be the House of Lords, specialised its judicial activity along the lines just mentioned, and generally followed the rules of common law, the smaller, the future Council, retained the earlier and broader competence, and tended to adopt the methods of equity. During the fourteenth and fifteenth centuries, there developed from the latter, in both the criminal and civil fields, something of great importance in English judicial history.

The criminal side can be dealt with briefly. The late fourteenth and the fifteenth centuries were, for England, a time of degeneration and lawlessness among the nobility. Starting in the factional strifes and personal hatreds of Edward II.'s time, the lawless tendencies were stimulated by the endless foreign war. It was the time of *livery and maintenance.* In suits to which the great and powerful were parties, juries were so bribed or intimidated that a fair trial in the ordinary courts was exceptional. Just when Englishmen first began to realise what a valuable and unique thing the jury was, it was being proved a failure in a certain class of cases. It had become established that cases involving capital punishment could only be tried by a jury, but there was still a very useful sphere of activity for a court not bound by established rules of procedure and which could not be bribed or intimidated. The Council became such a court, acting on its own original judicial authority and on several statutes of the Lancastrian period which specially empowered it to deal with certain cases.[1] It exercised a sort of supplementary criminal jurisdiction, and punished severely by fine or imprisonment. Rioting, conspiracy, and bribery furnished it much work; and of special importance was its activity in bringing perjured jurors to justice. Here was a method of preventing the complete degeneration of the criminal jury; when the juror accepted a bribe or yielded to fear, he knew that he might be severely dealt with for it. The way of the fifteenth-century juror was hard, the local terror on one side and fine or imprisonment at the hands of the Council on the other. The procedure of the Council was summary, and, in other respects, in sharp contrast to that of the common-law courts. It has been described as doing justice in an "administrative way." It utilised many of the methods of the canon law. It took short cuts to justice, and exercised what may be termed a criminal equity.[2] It is evident that the Council in this capacity might easily be a blessing or a menace to the nation; much depended upon the character of its members, more upon the character of the king and whether the king controlled it or was controlled by it. Its value was great throughout the middle ages and during parts of the Tudor period. Naturally the common-law judges were jealous of it and there was much agitation against it in Parliament; but agitation was in vain while this criminal justice was exercised moderately and well.[1]

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[1] On the earliest use in England of the word *parliament*, see below, pp. 362–364.

[2] Speaking of "the king in parliament" and "the king in council," Maitland says: "And the two are not so distinct as an historian, for his own sake and his readers', might wish them to be. On the one hand those of the king's council who are not peers of the realm, in particular the judges and the masters of the chancery, are summoned to the lord's house of parliament, and only by slow degrees is it made plain to them that, when they are in that house, they are mere 'assistants' of the peers and are only to speak when spoken to. On the other hand there is a widespread, if not very practical, belief that all the peers are by rights the king's councillors, and that any one of them may sit at the council board if he pleases."—Maitland and Montague, *Sketch of English Legal History*, pp. 116, 117.

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[1] "It is impossible to draw any precise line between those offences which the Council punished, acting as a government, and those which it noticed in the character of a law court; and such a distinction, could it be made, would only mislead, for it would hide what is the characteristic feature of the period under review, the inseparable combination in the Council of political and judicial authority."—Dicey, *The Privy Council*, p. 106.

[2] "It sends for the accused; it compels him to answer upon oath written interrogatories. Affidavits, as we should call them, are sworn upon both sides. With written depositions before them the lords of the council, without any jury, acquit or convict. The extraction of confessions by torture is no unheard-of thing."—Maitland and Montague, *Sketch of English Legal History*, p. 118. The Council's use of torture began in Edward IV.'s reign. For the new forms of writs of summons, especially the *sub pœna*, and the significance of their issue under privy seal, see J. F. Baldwin, *King's Court and Chancery*, American Historical Review, xv., 753, 754.

The civil jurisdiction of the Council, like its criminal jurisdiction and the appellate jurisdiction of the House of Lords, had its root in the idea that the king was the source of law, and in his administration of the law through his court. This original undeveloped court or council gave birth to special courts of law, but they were all king's courts. The king was less closely identified with them, however, than with their parent, his Council, and there were no definite boundaries to the judicial powers remaining in it.[1] Such boundaries would have been paradoxical, for the king's prerogative power was as yet but slightly limited and the Council was the king in action. As such, it could exercise a concurrent, a supervisory, or a supplementary jurisdiction. We are next to examine the conditions in the fourteenth century which made it necessary for the Council to develop a new line of activity in civil cases.

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[1] This criminal jurisdiction of the Council, as well as its growing civil jurisdiction, was meeting with great opposition in the fourteenth century. Statutes to limit or abolish it were passed in 1331, 1351, 1354, 1363, 1364, 1368. Later under Henry IV. and Henry V. the House of Commons brought in bills to the same end, but the king vetoed them. But Parliament was inconsistent and showed on several occasions that it was glad to have a court which could act in this summary way. There were notable instances in 1363, 1388, 1430, and 1453. Hence it is hard to tell whether by the end of the fifteenth century the criminal jurisdiction of the Council was legal or not. By that time the efforts against it had ceased, and the people seem to have become reconciled to its moderate use of this power. But the fourteenth-century statutes were unrepealed and were used by the Long Parliament as a ground for abolishing the Star Chamber. This was the name used in later history for the Council when acting as a court, and the name was of ancient origin: in Westminster, "a new pile of buildings, between the great hall and the palace, and next to the exchequer receipt, was begun at least as early as 1346. . . . It was expressly appointed for the use of the council, and was thenceforth so used. It was called the 'star chamber' from the first, though it was quite as often referred to as 'the council chamber next to the receipt of the exchequer.'"—J. F. Baldwin, *Antiquities of the King's Council*, English Historical Review, xxi., 16. Under the Stuarts, all the evil possibilities of the court were realised; controlled by a despotic sovereign, it invaded the liberty of the subject and did the exact opposite of its earlier service of protecting the people against oppression. Consequently the Long Parliament, in 1641, so regulated the Council's judicial capacity as to abolish this court. The idea, which obtained at this time, that the Star Chamber Court originated in the statute of Henry VII. (1487), which placed this criminal jurisdiction in the hands of certain specified men—most of them councillors—and which, for a time, practically took this work from the Council as a whole, was without historical foundation. See further J. S. Leadam, *Select Cases in the Star Chamber*, pp. ix.–lxxi. (Selden Society, vol. xvi.) It should be remembered that the Star Chamber never became a court and jurisdiction separate from the Council in any such way as the Court of Chancery did. To the end it was little else than the Council acting in its judicial capacity. Hence its abolishment nearly wiped out the judicial functions of the Council.

The system of writs, by which the common-law courts gained their civil justice, and which laid the foundation of the common law itself, has been described; as also the rapidity with which new writs were created and the general adaptability of the new civil jurisdiction.[2] This condition lasted till about the middle of the thirteenth century. From that time, new forces began to limit the creation of writs; that is, they limited the creation of new actions, and hence tended to fix and stereotype the common law. The writ-making power had been in the hands of the Chancellor, always a learned ecclesiastic of the king's Council. In his increasing business, he had gathered around him a staff of assistants, known as Masters, who were also ecclesiastics, and, like the Chancellor, learned in the Roman law. The first important objection to the issuing of new writs was when Henry III. made his unfortunate attempt to rule without ministers and writs were being issued without a Chancellor in an irresponsible and unusual way. The common-law courts were becoming established with their benches of judges. These judges were not always ecclesiastics, as formerly; and there had gradually formed a body of men, who might not very improperly be termed professional lawyers. There were already a body of law and a procedure that, in the eyes of such men, could not lightly be modified, and precedent was becoming very important in the administration of justice. The objection soon went beyond the matter of the irregular issue of writs: the Chancellor, on his sole authority, must not make new writs. To make new writs was to make new law, and the idea was growing that the law was nearly complete. By the Provisions of Oxford, 1258, the Chancellor was to swear "that he will seal no writ, excepting writs of course, without the commandment of the king and of his council who shall be present."[1] Moreover the judges took it upon themselves to decide whether or not writs issued by the Chancellor were innovations; they did this by refusing, if they saw fit, to allow the use of such novel writs in the actions for which they were issued. This was such an arbitrary and mischievous checking of the law's natural growth that a sort of compromise was attempted in 1285 in the Statute of Westminster, the Second:

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[1] It was but slowly, however, and well into the fourteenth century before Exchequer and King's Bench had lost this larger and vaguer competence and had become clearly differentiated from the Council. See above, pp. 176, note 3, 178, 179.

[2] *Ibid.*, pp. 142–144, 151, 152. The common law, that is, the law common to all the country which the king was developing through his courts, was equity to start with; it sprang from the royal prerogative, sought the ends of justice irrespective of existing forms, and gave remedy where the old courts (communal and private) failed. The original writs before they became stereotyped are quite analogous to orders and actions of the fourteenth-century Council in reply to petitions for grace or remedy against the rigours of a common law now become stiff and formal. In some of the earliest original writs (as *præcipe*) we even get a hint of the wording of an old petition. Equity was no new thing in the fourteenth century; its essence dates back to 1066. For a discussion of this matter and an excellent summary of its literature, see G. B. Adams, *The Origin of English Equity*, Columbia Law Review, xvi., 87–98; and *The Continuity of English Equity*, Yale Law Journal, xxvi., 550–563.

> And whensoever from henceforth it shall fortune in the chancery, that in one case a writ is found, and in like case falling under the law, and requiring like remedy, is found none, the clerks of the chancery shall agree in making the writ, or shall adjourn the plaintiffs until the next parliament and write the cases in which they cannot agree, and refer them to the next parliament, and by consent of men learned in the law,

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[1] A. and S., p. 58.

a writ shall be made, lest it might happen hereafter that the court should long time fail to minister justice unto complainants.[1]

But even this slight power to innovate, merely creating writs for actions which were similar to those already having writs of course, was opposed by the judges and soon became inoperative.[2] "Henceforth the common law was dammed and forced to flow in unnatural artificial channels. Thus was closed the cycle of original writs, the catalogue of forms of action to which nought but Statute could make addition." [3]

The mention, in the Statute of Westminster, of Parliament as a place of legislative authority and the use of the word statute suggest that Parliament was about to solve the difficulty by making new laws for new cases. But there was no Parliament in 1285 in the sense in which the word is now understood. In this act, it probably meant nothing more than the king's Council. But there was a Parliament by the middle of the fourteenth century, and the principle was being asserted that no new law of a permanent character could come from any other source. Had Parliament then proceeded to legislate in a copious and intelligent way, the need felt at that time would have been met substantially as at present. But this early Parliament stoutly opposed the making of new writs, and did not itself produce their equivalent. After an extraordinary outburst of legislation under Edward I., when Parliament, if we may speak of one at all, was in its primordial fragments, there ceased, with a few noteworthy exceptions in the fourteen century, to be important law-making until the Tudor period.[4] This brings the situation squarely before us. Where were the new cases to go for which the "dammed-up" common law and its courts did not provide?

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[1] A. and S., p. 76.

[2] This very legislation of Edward I.'s reign, so abundant and fundamental, fostered the idea that the Chancery was not the proper source of new law.

[3] Maitland, *Bracton's Note Book.*

[4] "Parliament seems to have abandoned the idea of controlling the development of the common law. Occasionally and spasmodically it would interfere, devise some new remedy, fill a gap in the register of writs, or

It cannot be denied that, as time passed, a good many small leaks began to show in the dam. While fearfully afraid of avowed innovation in the law, the common-law judges were not unmindful of changed conditions or of the value of gaining new kinds of cases. But they must be gained through such juggling with the old law as would make it appear that there was nothing new.[1] There was much, however, for which the common law did not provide, or for which it provided inadequately; cases of fraud and seizures at sea were of this sort. Plaintiffs began to seek relief, in such matters, at the higher and more ancient tribunal from which the common-law courts themselves had sprung, the king in his Council. There might be grounds for this action other than the inadequacy of the common law to cover their cases: they were poor and unable to bear the expense of ordinary litigation, or their poverty rendered the law's delay disastrous; they were labouring under some local prejudice and distrusted jury trial, or they were contending with a wealthy lord who

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circumvent the circumventors of a statute. But in general it left the ordinary law of the land to the judges and the lawyers. In its eyes the common law was complete or very nearly complete. And then as we read the statute-roll of the fifteenth century we seem for a while to be watching the decline and fall of a mighty institution. Parliament seems to have nothing better to do than to regulate the manufacture of cloth."—Maitland and Montague, *Sketch of English Legal History*, p. 106. But despite the legislation of Edward I.'s reign and the wording of some fourteenth-century parliamentary assertions, one must conclude, on the basis of what actually happened, that the idea of making new law by Parliament or any other authority was but slightly developed in the middle ages. See also below, pp. 298, 418–420, for the effect upon statutory legislation of the separation in the fourteenth century of Parliament and Council.

[1] "In the fifteenth century there were great judges who performed what may seem to us some daring feats in the accommodation of law to new times. Out of unpromising elements they developed a comprehensive law of contract; they loosened the bonds of those family settlements by which land had been tied up; they converted the precarious villein tenure of the middle ages into the secure copyhold tenure of modern times. But all this had to be done evasively and by means of circumventive fictions. Novel principles could not be admitted until they were disguised in some antique garb."—Maitland and Montague, *Sketch of English Legal History*, pp. 111, 112.

could buy or intimidate the jury and to whom delay was indifferent. On the same plenary conception of his judicial power, which authorised the king to pardon the criminal condemned by the common-law courts,[1] he could entertain in his Council the cases of these poor petitioners.[2] Thus, in the fourteenth century, the Council exercised more and more, what it had never fully ceased to exercise, a justice concurrent with, and supplementary to, that of the common-law courts.

But the Council was a large, unprofessional body, and if this line of activity were to increase and become regular, some specialisation must take place within it. The king could not attend to it personally, and the whole Council could not. For two main reasons, the Chancellor was the member of the Council to whom it was increasingly intrusted. He had become the king's chief minister by the end of the thirteenth century, and presided over the Council in the king's absence.[3] If petitions were not brought directly to the king, they naturally went to the man who most regularly represented him.[1] And the Chancellor was a learned man with a corps of learned assistants, who knew the civil, that is, Roman, and canon laws. The common-law judges had many a time borrowed the principles of Roman law in dealing with new problems; an official specially versed in that law could most appropriately entertain unusual cases. On general principles, trained men were needed to deal with civil cases, the most important of which had to do with the increasingly intricate land law. Criminal cases brought before the Council, might be handled summarily by the king and the whole body; civil cases must be examined in the Chancery.[2] It may be remarked further that the Chancellor was more at leisure than he had for long been; the writ business was declining—the chief reason, as has been shown, for the Council's growing judicial activity.

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[1] Speaking of the bearing of the royal prerogative upon England's whole judicial development, Professor Adams says: "The essential fact is the existence of the king's prerogative; that is, of a power recognised as above the ordinary everyday machinery of the state, whatever that may be at any given time, and free therefore from the rules and regulations which condition the running of that machinery. For this reason it is at liberty to act as above the law to secure any sufficiently important object, the furnishing of justice to all, the enforcement of the rule of conscience, the establishment of a system of criminal equity, the suspension of a statute for a special purpose, the creation of a new offence by proclamation, or the pardoning of a convicted criminal." *The Continuity of English Equity*, Yale Law Journal, xxvi., 550–563.

[2] "Odd though this may seem to us, that court which was to become a byword for costly delay started business as an expeditious and a poor man's court."—Maitland and Montague, *Sketch of English Legal History*, p. 122.

[3] The Chancellor was taking the place of the Justiciar, who, from the Norman Conquest, had been the greatest official and had represented the king in the latter's frequent and long absences on the continent. Henry III. tried to be his own Justiciar. He finally was forced to appoint one, but after the office became vacant in 1268 there was never another appointed. This led to the rise of the Chancellor and marked progress in the separation of the judicial and executive departments. Edward I.'s Chancellor, Robert Burnell, was his leading adviser. "The Chancellor first appears in England under Edward the Confessor. He was the chief secretary, head of the king's chaplains, and keeper of the royal seal. The name was derived from the *cancelli* or screen behind which he worked. Owing to the literary qualifications of the office, in the early days it was always in the hands of an ecclesiastic." Medley, *English Constitutional*

An ordinance of 1290 ruled that petitions to king and Council must come through the hands of the Chancellor or other minister. This was but a slight beginning, but it emphasised the Chancellor's position and early in the next century a good deal of the Council's civil jurisdiction was being virtually turned over to him. By the end of Edward II.'s reign, it had become a regular, perhaps the

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History, p. 408. Also in the later days he was usually a bishop, although there were a few lay Chancellors in the fourteenth century. See below, pp. 315, 316.

[1] In the early days these were not always sent to the Chancellor; sometimes they went to the Treasurer. There was rivalry between Chancellor and Treasurer; there was a struggle. Practical reasons were leading petitioners to select the Chancellor among the Councillors: his influence, his writ-issuing function, his executive power in enforcing the law. During Edward III.'s reign, reference through the Chancellor became regular.

[2] This distinction arose first probably through the choice which the suitor had between methods of treatment. The Chancellor used the great seal, while the Lord Privy Seal was becoming an increasingly important member of the Council. By writs of privy seal cases could be concluded more quickly and at less cost than by those of the great seal, but the latter gave greater security. Finally it became an established principle that while "great criminal trials required the power and expedition of privy seal procedure, claims to title sought the security afforded by the instruments of the great seal." There is much valuable material on this whole subject in Baldwin's *The King's Council*, ch. x., "Council and Chancery."

most important, part of his work. Moreover, suits to which the king was a party, suits which, before this, the king had apportioned quite evenly between the common-law courts and the Council, he now preferred to have tried before the Chancellor. Nevertheless, Chancery emerged as a court separate from the Council gradually, almost imperceptibly. For a long time, civil cases, like criminal, were brought to the "king in Council," and were heard directly by him and his Council or were turned over to the Council's chief official as the royal convenience or the nature of the case dictated.[1] As time passed, an increasing number actually went to the Chancellor.[2] But in either case, the work was done in the Council, and no one was conscious that anything new was being made. Finally it was an accomplished fact; in Richard II.'s reign, it could no longer escape notice that out of the Council a new court had grown, and men began to speak of it as such. But even at that time, it was hardly a separate jurisdiction; it was rather a permanent and recognised judicial committee of the Council, constantly drawing its authority from that body.

While Chancery grew, it used new principles and developed a new procedure. Indeed, its growth depended upon its ability to do this. As, at an earlier time, the king's court and its first offspring, the common-law courts, were plastic, and developed a law and procedure vastly different from the antique formalism of the Anglo-Saxon court system,[3] so now Chancery was measurably in the same relation to these common-law courts, now themselves growing old and formal. But history was not to repeat itself to the extent of Chancery's assimilating or exterminating these courts. The common law was virile, but needed supplementing at a time when it refused to grow fast enough and was not being helped by statute. It was Chancery's use of new principles[1] and procedure that was mainly responsible for its recognition as a distinct court. The procedure was partly derived from the ecclesiastical courts and was partly a new creation to meet existing needs.

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[1] At first there was little distinction between the petitions presented to Parliament and those to the Council. At each session of Parliament committees of hearers and triers of petitions were appointed. The Council dealt with those left over and those presented when Parliament was not in session.

[2] In Edward III.'s reign, the form of petition was often to Chancellor and Council. This was transitional, and soon the address was to the Chancellor only. In the same reign the Chancellor began to administer justice on his own authority without a preliminary writ.

[3] See above, p. 143 and note 2.

In flagrant contrast to the common law, it forced the defendant to answer on oath the charges that were brought against him; it made no use of the jury; the evidence consisted of written affidavits.[2]

The Chancellors' training in Roman and canon law did not lead to a wholesale borrowing of that law for their court, as has often been taken for granted. They did not abandon the common law and adopt a new system. While they knew of the equitable jurisdiction of the Roman Prætor, they did not attempt to adopt the results of that jurisdiction. Rather, both Roman Prætor and English Chancellor, *mutatis mutandis*, acted under the same fundamental authority, the authority of the sovereign as source of law, to deal with the law as occasion required.[3] When

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[1] Chancery was giving new remedies. For instance, if a man broke his contract all that the common-law courts could do was to fine him. The Chancellor could force him, on pain of imprisonment for contempt of court, to keep the specific contract.

[2] Maitland and Montague, *Sketch of English Legal History*, p. 125.

[3] This principle, as far as the nations of western Europe are concerned, originated in Rome. Of its ultimate source there and its disposition during the Republic, Sir Henry Maine says: "At the crisis of primitive Roman history which is marked by the expulsion of the Tarquins, a change occurred which has its parallel in the early annals of many ancient states, but which had little in common with those passages of political affairs which we now term revolutions. It may be best described by saying that the monarchy was put into commission. The powers heretofore accumulated in the hands of a single person were parcelled out among a number of elective functionaries, the very name of the kingly office being retained and imposed upon a personage known subsequently as the Rex Sacrorum or Rex Sacrificulus. As part of the change, the settled duties of the supreme judicial office devolved on the Prætor, at the time the first functionary in the commonwealth, and together with these duties was

Chancery is spoken of as a court of *equity* or the Chancellor as exercising an *equitable* jurisdiction, the meaning is that, while the common law was used as far as possible, when it was found that its use resulted in what was not equitable or in conformity to the dictates of conscience, then it was modified or supplemented as the ends of justice seemed to require. In doing this, the Chancellor might use his Roman or canonical learning, but he more often preferred to extend or modify some already existing principle of the common law.[1] He was, as it has been expressed, making an appendix to the common law. He was not concerned with making a new body of law; he dealt with each case singly as it arose. Generalisation was not his function, and, in the early days, past decisions were not much used as precedents. "Sufficient for the day are the cases in that day's cause-list."

The common-law judges were not friendly to this upstart jurisdiction, and protest against it often found voice in Parliament.[2] In the early days, before Chancery attempted much supervisory jurisdiction, the chief objection was against its purely common-law practice. When the

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transferred the undefined supremacy over law and legislation which always attached to ancient sovereigns, and which is not obscurely related to the patriarchal and heroic authority they had once enjoyed."—*Ancient Law*, pp. 61, 62. Since the Norman Conquest, the English kings had been more and more putting their judicial authority into commission. The analogy between the fourteenth- and fifteenth-century Chancellor and the Roman Prætor is in many respects striking.

[1] "To restrain an unconscionable or inequitable use of legal rights is not (such seems the theory) to override the law, it really is to do what the law means to do, but is prevented from doing by causes not to be foreseen. . . . But we may perhaps mark the character of equity by calling it supplemental law. From the first the theory had been that equity had come not to destroy but to fulfil, and the success of the Chancery, which was jealously watched by Parliament, had depended on at least an outward observance of this theory."—Maitland, *Justice and Police*, pp. 36, 38. As to whether or not the introduction of the rule of conscience was "so fundamental as to constitute a new beginning, back of which we cannot trace the history of modern equity," see the discussion in W. S. Holdsworth, *The Relation of the Equity Administered by the Common-Law Judges to the Equity Administered by the Chancellor*, Yale Law Journal, xxv., 1–23; and G. B. Adams, *The Continuity of English Equity*, *ibid.*, xxvi., 550–563. It will be seen that the view adopted in the present text is that it was not.

[2] See above, pp. 213–215.

common law had a sufficient remedy, the fact that a party to a suit was poor or feared his powerful opponent was not regarded a good reason for drawing such suit from the court where it naturally belonged. This side of Chancery's business never became important, and in time tended to decrease. To its supplementary or equitable jurisdiction, Parliament was not able to urge very valid objections, and the common-law courts tacitly, though grudgingly, conceded that here the new court had a reason for existence. But though Chancery's work in this line was soon considerable, it was desultory, the field of activity was vague. No important, definable class of cases had been appropriated. Had this condition continued, Chancery could hardly have become a separate jurisdiction, and its later history would have been radically different and far less important.

About the end of the fourteenth century, a special kind of business, growing out of the inadequacy of the land law, was brought into Chancery in such quantity that it was soon looked on as the peculiar jurisdiction of that court. Under the common law, it was impossible to will land, and the feudal accompaniments of tenure were often felt to be burdensome and antiquated. Was there no possibility of enjoying the use and profit of land while escaping the responsibilities of ownership? Was there no way in which a man could determine who should have the use of his land after him? Necessity was the mother of invention, or rather of extension and adaptation. For the required method existed already, but had been confined to a narrow sphere. In the thirteenth century, a method had been often used by which the Franciscan friars, who by the rule of their order could own no property, enjoyed the use of real estate while not technically owning it. A man disposed of lands and houses to a party who was to be its legal owner, but who, by the terms of the transaction, was to hold them to the use of a certain body of friars. This expedient had been occasionally used from very early times, but it never became prominent until the peculiar need of the friars led to its rapid extension after their coming to England. In its early use, its success depended entirely upon the good faith of the legal owner of the property; when the contract was made between him and the grantor, he was bound in honour to hold the land to the use stipulated.[1] Because the device had been so seldom used before the thirteenth century, it had obtained no recognition in the common law; for when it came into more frequent use that law had passed its receptive period. So if the owner chose to disregard his honourable understanding, there was no legal remedy for the party to whose use the property had been given. However, the beneficiaries being for the most part clergy, it is probable that the church courts sometimes took account of such breach of contract. At any rate, the friars could always invoke the terrors of excommunication and interdict against unfaithful legal owners.

The king took little account of this method of benefiting the friars, but he was becoming greatly alarmed at the amount of land passing into the ownership of the church in general. Hence the Statute of Mortmain, 1279, which prohibited further alienation of land to the clergy.[2] The problem of dodging this statute immediately arose. The method was at hand. Friars could not own land because of their rule; by the Statute of Mortmain, the rest of the clergy[3] could own no more land than they already had. To meet the second case, as the first, legal ownership might be vested in a person or persons, who, for substantial reasons, entered into a private understanding to allow the use of the land to the church. Thus the practice of *uses* was greatly extended as the fourteenth century progressed. An act of 1392 effectually put a stop to it as far as the church was concerned;[1] but before that time, it had occurred to laymen that here was a neat way to accomplish for themselves certain things not provided for by the common law.

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[1] When friars were the beneficiaries, the legal owner was very often a borough.

[2] A. and S., pp. 71, 72.

[3] The language of the statute limited its application to the monastic clergy, but in its later interpretations this limitation was not observed. See Gross, *Mortmain in Medieval Boroughs*, American Historical Review, xii., 741.

Assuming the feoffees to uses[2] to be willing and faithful instruments of the beneficial owner, his advantages were great. Though he were involved in the civil strife of York and Lancaster, and dealt with as a traitor by victorious enemies, the land would be secured for his children; for it legally belonged not to him but to the feoffees to uses, and therefore was not forfeited by his attainder. For the same reason nothing was payable to the overlord on his death; there could be no legal succession while any of the feoffees remained alive, and herein was the convenience of naming several in the first instance. The numbers might be kept up from time to time by new conveyances, as is the common practice to this day with bodies of trustees established for charitable and public purposes.[3]

It will be seen from this how the beneficiary could virtually will the land. While the legal ownership could not be regulated by will, the extra-legal use could be disposed of in a purely informal way; the beneficiary could declare to the legal owners where the use should go after his death. With outgrown land laws and much to make ownership burdensome, the idea of uses just fitted the situation and became so popular that a large part of the land of England was affected by it in the early fifteenth century.[4]

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[1] A. and S., p. 155.

[2] This was the technical term for legal owners.

[3] Pollock, *The Land Laws*, p. 93.

[4] At the beginning of the fourteenth century, nearly all free tenures in England were subject to the law of primogeniture. By the system of uses, provision could be made for younger sons and daughters. This furnished a powerful motive for extending the system. Primogeniture still holds in the descent of real estate. If there are no sons the land is divided equally among the daughters. Thus feudalism has its traces in the present land-law. But land can be willed. By a statute of Henry VIII. (1540), all land held in fee simple, except feudal tenure, could be willed, and of feudal land two-thirds. With the abolition of the feudal tenures in 1662, all freehold land could be willed.

But uses were not recognised by the law, and the crucial question was where an authority could be found to force the legal owner to keep his honourable agreement. For when the practice became general, trusting to personal honour proved an inadequate guarantee. The same resource was found as in other cases in which the common law failed to provide a remedy; the distressed beneficiary, who was being defrauded of his equitable rights, appealed to the Chancellor as the depository of the king's all-powerful and over-riding justice. The Chancellor interfered and, by fine or imprisonment, forced the legal owners to keep faith. It was not long before this work, developing subdivisions and minutiæ that cannot be examined here, was the chief and characteristic business of the Court of Chancery. Thus during the last two centuries of the middle ages, a transformation of the land laws was well under way,[1] and a new court with a special jurisdiction had arisen. For Chancery's monopoly of this new field completed its separation from the parent stem;[2] by the reign of Edward IV., the Chancellor, in his judicial capacity, no longer acted for the Council. His court had already created considerable supplementary law, and, with the evolution of the common-law courts in mind, it is not hard to understand that there would come a time when the Chancellor's conscience had become "a technical conscience" and his court as much bound by precedent as its predecessors.[1]

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[1] On this strange method of changing a body of law, Maitland comments: "It is an exceedingly curious episode. The whole nation seems to enter into one large conspiracy to evade its own laws, to evade laws which it has not the courage to reform. The Chancellor, the judges, and the parliament seem all to be in the conspiracy. And yet there is really no conspiracy: men are but living from hand to mouth, arguing from one case to the next case, and they do not see what is going to happen."—*Sketch of English Legal History*, p. 123. It is apparent that, as this way of manipulating legal ownership grew more common, the number of occasions upon which the great landholders could collect reliefs, and the king reliefs and *primer seisins* (see above, p. 121, note 1), would decrease. There is some evidence that king and lords were becoming aware of this during the fifteenth century; but Henry VIII. was the first king who was fully aroused to the situation. He attempted to cope with it by forcing through Parliament the famous Statute of Uses in 1536. For a discussion of the failure and the peculiar legal results of this statute, see Pollock, *The Land Laws*, pp. 97–106. For further discussion of the Chancellor's jurisdiction, see W. P. Baildon, Introduction to *Select Cases in Chancery* (Selden Society, vol. x.).

[2] Yet this separation did not deprive the Council of all its civil jurisdiction. At the present day it is, through its judicial committee, practically a court of appeal from the ecclesiastical courts and from the courts in the crown colonies and dependencies.

4. **The Common Law.**—England's exceptional legal history has been an important element in determining the final character of English government. In the period covered by this book, the main features of the law were established. It is therefore proper here, without touching the detail of substantive law, to speak briefly of these distinguishing traits; especially to note their constitutional bearing. The term *common law* is at present used in more than one sense and often vaguely.

It has been thus defined:

> (a) In its most general sense, the system of law in force among English-speaking peoples, and derived from England, in contradistinction to the civil or Roman law and the canon or ecclesiastical law. (b) More appropriately, the parts of the former system which do not rest for their authority on any subsisting express legislative act; the unwritten law. In this sense common law consists in those principles and rules which are gathered from the reports of adjudged cases, from the opinions of text writers and commentators, and from

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[1] For a brief summary of the later history of Chancery, see Medley, *English Constitutional History*, pp. 410–413. Maitland has summed up the constitutional significance of the two late judicial developments with which this section has been concerned: "Somehow or another England, after a fashion all her own, had stumbled into a scheme for the reconciliation of permanence with progress. The old medieval criminal law could be preserved because a Court of Star Chamber would supply its deficiencies; the old private law could be preserved, developed, transfigured, because other modes of trial were limiting it to an appropriate sphere. And so our old law maintained its continuity . . . The Star Chamber and the Chancery were dangerous to our political liberties. Bacon could tell King James that the Chancery was the court of his absolute power. But if we look abroad we shall find good reason for thinking that but for these institutions our old-fashioned national law, unable out of its own resources to meet the requirements of a new age, would have utterly broken down, and the 'ungodly jumble' would have made way for Roman jurisprudence and for despotism. Were we to say that equity saved the common law, and that the Court of Star Chamber saved the constitution, even in this paradox there would be some truth."—*Sketch of English Legal History*, pp. 127, 128.

popular usage and custom, in contradistinction to statute law. (c) More narrowly that part of the system just defined which was recognised and administered by the king's justices in contradistinction to the modifications introduced by the chancellors as rules of equity in restraint or enlargement of the customary and statutory law.[1]

Beside this, may be placed the history of the term. Common law first meant a law that was common to all England, a law not for this or that county or borough. It was thus used in the twelfth and thirteenth centuries. It was next used in opposition to statute law, as the latter developed during the fourteenth century; then, in opposition to equity when the Court of Chancery became important in the fifteen century. By that time, the conception of it as a body of law older than, and in important ways distinguished from, two other bodies of law had crowded out the original meaning of *common*. The first of the present usages, just cited, seems to have come from applying to the whole of England's law the name of its most characteristic and historically important part. It is an untechnical use, but serves to distinguish England's law and legal history from those of other European countries.

Had no system of king's courts grown after the Norman Conquest, the Anglo-Saxon law, administered in the local courts, would, it is to be supposed, have continued to develop. It seems, from what is known of continental history, that from such a law, administered in courts so isolated from one another, no law common to the whole country could have grown. Without the common courts, there could not have been the common law. Rather, the differences, which existed among the localities when conditions were primitive and the people fairly homogeneous, would have become ever greater. The kind of law used in the twelfth-century king's courts has already been noticed—its adaptability, the variety of its sources.[1] What needs insistence here is that these courts were common courts. They were opening wider to all litigants; ever more regularly were justices sent to travel through the country and administer law. The same men went on various iters and gave the people the same law the country over. The reign of Henry II. was distinctly the time when the foundation of the common law was laid, both as to content and its characteristic of commoness. But legislation was informal and largely unconscious:

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[1] The Century Dictionary. This definition has been quoted in full to make clear the present, accepted usages, and to avoid explanations in the course of the discussion.

> . . . a few written or even spoken words communicated to his justices, whom he was constantly sending to perambulate the country, might do great things, might institute new methods of procedure, might bring new classes of men and things within the cognisance of the royal court. Some of his ordinances—or "assizes," as they were called—have come down to us; others we have lost. No one was at any great pains to preserve their text, because they were regarded, not as new laws, but as mere temporary instructions which might be easily altered. They soon sink into the mass of unenacted "common law." Even in the next, the thirteenth, century some of Henry's rules were regarded as traditional rules which had come down from a remote time, and which might be ascribed to the Conqueror, the Confessor, or any other king around whom a mist of fable had gathered.[2]

From the middle of the twelfth to the middle of the thirteenth century was the time when the common law, as distinct from statute law or equity, was made.[3] Those who then had most to do with it were trained in the Roman and canon laws; and it was influenced from Roman sources, not by much actual borrowing, but by the unconscious effects of spirit and method. It has been well said that, at that time, the common law was sufficiently inoculated with the Roman law to make it unlikely to fall under the latter's completer sway at a later period.[1] In the last half of the thirteenth century, there was a radical change of attitude in the guardians of the law. Law was no longer in the hands of ecclesiastics; a class of professional lawyers was forming. As the common law became more fixed and circumscribed,[2] any attempt to modify or enlarge it, especially from what was doubtless regarded as a rival system, was looked upon with disfavour.

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[1] See above, p. 143 and note 2.

[2] Maitland and Montague, *Sketch of English Legal History*, pp. 77, 78.

[3] Its growth, at that time, through the making of writs has been dealt with above, pp. 151, 152, 212, 213.

The two great treatises of Glanville and Bracton, the one coming at the beginning and the other at the end of the common law's creative century, were most important in England's legal history. Late in Henry II.'s reign was written a *Treatise on the Laws and Customs of England*, ascribed to Ranulf Glanville and always passing under his name.[3] The impulse to write such a treatise, a very remarkable performance for the time, probably came from the revived interest in Roman law characteristic of the twelfth century. But there is little Roman law in the work, and the author shows no desire to adopt it; it is not Roman even in the matter of arrangement. The law of the king's court is the subject, little or no attention being paid to the law administered in other courts; and there is more about procedure than about substantive law. Though the Treatise was unofficial, it had a great influence upon the law and procedure with which it dealt. It was an able attempt to formulate and arrange a very vague and elusive material, and put into durable condition many valuable things that might otherwise have been lost. Its coming at the end of Henry II.'s reign was extremely opportune.

Equally timely was the greater work of Bracton, *Con-*

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[1] See the citation from Brunner in Maitland, *English Law and the Renaissance*, note 55.

[2] See above, pp. 214, 215.

[3] It was perhaps written by Glanville's nephew, Hubert Walter; but the authorship will probably never be known with certainty. See Maitland's article on Glanville in the *Dictionary of National Biography*.

cerning the Laws and Customs of England. It was written about the middle of the thirteenth century, and is by far the most important law-book which appeared in England in the middle ages. It owes much more to Roman law than Glanville's work, about one-fifteenth of it being borrowed from the *Summa* of Azo, "a legist who stood at the head of the Bolognese school of law early in the thirteenth century." There was also much that was Roman in Bracton's arrangement. But with the exception stated, the law that Bracton gives is English. It is not theoretical, an ideal system; but emphatically the law of his time, the law that had been made by adjudged cases, and the cases that he cites are many.[1] Just as this work appeared, the forces tending to fix the common law were making themselves felt. Although, like Glanville's, this was a private undertaking, it hardly needs to be said that such a comprehensive and sympathetic statement of English law coming at that time became an authority of the highest influence.

An epoch in legal history was closing with Bracton. A new system of courts, with appropriate law and procedure, had been made; borrowing from the Roman law, at least for a long time to come, was at an end; the making of new writs, that is, new forms of action, was no longer easy; there was a system of legal forms.[2] One is, at first, surprised that a law and procedure so young and mobile under Henry II. should have grown old and rigid in his grandson's reign. The truth seems to be that the time was too early to obtain, by any process, a permanent and rational system of equity. England passed rather rapidly from "the old oral and traditional formalism" of the Anglo-Saxon period to this "new written and authoritative formalism" which "in part supplanted and in part reinforced it." But the advance of the new over the old was very great. That there was any break from the old system and a time when new courts exercised an equitable jurisdiction for all England, a time of legal growth on a splendid scale, was owing to the Norman Conquest. And the new formalism was a *common* formalism, while the old was not.

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[1] About two thousand such citations are found in the famous "note book" which in all probability was the work of Bracton. It has passed under the name of *Bracton's Note Book* and contains transcripts from the rolls kept by the Bench, the court held *coram rege*, and the itinerant justices.

[2] This system resembles the Roman formulary system, especially in the way it grew, but was not derived from it. It could not have been, for the lawyers of this time were interested, if at all, in the finished product of Roman law, the Justinian Code, not in the history of that law; they probably did not know it had passed through an evolution analogous to that through which English law was passing. "Edward I. has been called 'the English Justinian.' The suggested comparison is not very happy; it is something like a comparison between childhood and second childhood." Maitland, *C. H. E.*, p. 18.

The development of the new formalism was not an unmixed evil. When a man chose an action in the late thirteenth century, he embarked on a sure course, all was marked out for him; in an unspeakable mass of rules, an attempt was made to provide for every contingency. This meant that the discretionary power of the judges was small. With the judges of the three common-law courts so fully under royal control as they were for four centuries after this, the formulary system must be regarded as having been an important safeguard of the subject's liberty. The modern development has been to give the judge more freedom, to allow him, in many particulars, to suit the action to the peculiarities of the case; "but discretionary powers can only be safely entrusted to judges whose impartiality is above suspicion and whose every act is exposed to public and professional criticism."[1]

It must not be thought, however, that the judges of the later middle ages were wholly powerless to initiate; they were always making some new law when they made their judgments. But their judgments of law were based upon the verdicts of jurors drawn from the people, and these verdicts were increasingly judgments of fact; the judges applied the law to facts judged by the people. This kept the law from theoretical flights which might have borne it away from the domain of the practical and serviceable. The law never escaped from the people; they were making their law or keeping it from being made. No absolutism was running the people into the mould of a foreign, or theoretically perfect, law. On the contrary, the law has reflected all the peculiarities and conservatisms of the English people at any given time. This went far to make it ineradicable; the people could not get along without it because it was a part of them.

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[1] P. and M., ii., 563. For a full discussion of the forms of action, see *ibid.*, ii., 558–573. "Die Form ist die geschworene Feindin der Willkür, die Zwillingschwester der Freiheit."—Ihering, *Geist des römischen Rechts*, ii. (2), § 45, quoted in P. and M., ii., 563, note 2.

Another agency that helped make the English common law permanent had its origin at just the time the law was completing its period of rapid growth. The great English law schools, the Inns of Court, are first dimly seen about the end of the thirteenth century. They became thoroughly established in the reigns of Edward III. and Richard II. It is an interesting fact that the common law did not find its home in the universities. There the ground had been taken by the civil and canon laws, and the teaching of these had become so identified with university work that when there was an English law to teach it seemed an unnatural thing to give it a place beside them.[1] No one consciously founded the law schools; they grew out of the needs of the time which determined their location and most else about them.

In the first half of the thirteenth century, it was becoming evident that English justices would soon cease to be drawn from the clergy. The spirit of this period of papal power and church unity was to keep the clergy from taking part in lay affairs. If they touched such things, it should be as masters, not participants. It was especially unseemly for bishops to sit on the bench and dispense a layman's law, which dealt with much that was a contamination to an ecclesiastic. A series of canons, forbidding the clergy to deal with secular law, began to appear, and were not without effect. The clergy became more careful to withdraw when the death sentence was pronounced or a matter considered to which they might not listen without scandal; and many were the devices of elision and abbreviation in wording by which their share in such affairs was concealed and their consciences saved.[1] But it was harder to conceal a breach of the new rules in the case of the higher clergy, and bishops were found less and less among the justices; their places were taken by laymen who had come to a knowledge of the law by filling subordinate positions in the courts. At the end of Henry III.'s reign there were more laymen than clerks connected with the courts, and, though there were clerical justices throughout the reign of Edward I., the end was in sight. A body of lawyers, practising in the king's courts, had formed and many justices came to the bench who had already served as advocates. To speak of a class of professional lawyers and lay justices, who had been lawyers, seems modern, and, in truth, Edward I.'s reign, in many ways, marked the beginning of the modern period in the legal history of England.

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[1] "The voice of John Wyclif pleading that English law was the law that should be taught in English universities was a voice that for centuries cried in the wilderness. . . . It was 1758 before Blackstone began his ever famous course at Oxford. The chair that I cannot fill was not established until the trans-Atlantic Cambridge was setting an example to her elderly mother."—Maitland, *English Law and the Renaissance*, pp. 25, 26. Maitland was Downing Professor of the Laws of England in the University of Cambridge.

When English law severed its connection with ecclesiastics, it was separated from the Roman law and also from the learning and literature of the time. The danger that absolutism might be fostered by the absorption of too much Roman law was past, and there was also little possibility that the law of the future would be blessed with any great legal treatise such as Bracton's. The divorce of law and learning brought bad results. Edward I. knew this and, in 1290 and 1292, instituted commissions of inquiry. By the second commission, it was suggested that promising students be gathered from the various parts of England and placed near the courts at Westminster, with the evident intention of having them trained for service in those courts. The origin and early history of the Inns of Court are not known in detail, but here was the situation out of which they grew. A common law was recognised; some sense of its national character was dawning, of its distinction from Roman or canon law; it was in the hands of laymen and it could not be taken for granted that these men had received any training, legal or other, at the universities—as a matter of fact, they got their knowledge of the law and entered its higher service through training in its courts. And these courts were at Westminster; this was the home of the common law, not Oxford or Cambridge. Young men looking to a legal career gathered in the vicinity, and the four great law schools were born: Lincoln's Inn, the Inner Temple, the Middle Temple, and Gray's Inn. It is not the place here to say anything of the organisation or work of these schools. But their character was unique; in origin essentially fraternities of lawyers, and always remaining such, they undertook the training of students, worked out a system of instruction, government, and discipline of their own, had their own preparatory schools, and conferred "what in effect were degrees, and degrees which admitted to practice in the courts."[1]

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[1] "Take him away and let him have a priest" was one of the euphemisms, which by a pious fiction saved the clergymen who heard them from a share in their grim reality.

The importance of the law schools in this connection was their influence in making the common law enduring. They were thus largely responsible for that law's share in England's governmental destiny. This achievement is summed up in Maitland's saying that "taught law is tough law." It would be difficult to conceive any scheme better suited to harden and toughen a traditional body of law than one which, while books were still uncommon, compelled every lawyer to take part in legal education and every distinguished lawyer to read public lectures.[1]

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[1] Maitland, *English Law and the Renaissance*, note 60; see this note also for literature upon the subject. "What is distinctive of medieval England is not parliament, for we may everywhere see assemblies of estates, not trial by jury, for this was but slowly suppressed in France. But the Inns of Court and the Year Books that were read therein, we shall hardly find their like elsewhere."—*Ibid.*, p. 27. "They were associations of lawyers which had about them a good deal of the club, something of the college. something of the trade-union."—Maitland and Montague, *Sketch of English Legal History*, p. 110.

In the law schools, were used the Year Books, also a peculiar product of the English court system and a further proof that at the end of the thirteenth century a new era in English law had begun.[2] In 1292, just when Edward was investigating the decline in legal learning which resulted from the withdrawal of the clergy, the Year Books began. They continued, with almost no interruption, until 1535. They were

so called because there was one for each regnal year. They are anonymous law reports, written in French, containing the discussions of the judges and counsel on the points of law, and the grounds of judgment in important cases tried before the royal justices either at Westminster or in Eyre. . . . According to an old legal tradition, these reports had official sanction and were drawn up by reporters in the employ of the crown.[3]

However, they were probably not official, but notes taken by law students, their private note-books.[4] These reports, continued with such regularity and fulness, are proof of the persistence of the spirit of conservatism and respect for precedent which marked the time of their birth, and they aided greatly in its preservation. Since no more law was to be made, the matter of chief interest was to know how successive judges had used already existing principles and procedure. During the fourteenth and fifteenth centuries, precedent was built upon precedent and the mass of recorded rules was reasoned upon and refined to the last extreme of logic in the academic atmosphere of the Inns of Court, until the common law had become a wonder and a terror to every one outside the legal fraternity. Since Edward I., the law of England has undergone no such fundamental change as it experienced in his time. The modern lawyer may trace back his legal traditions through more than six centuries, but the attempt to follow them into the wonderful, creative century before Edward I., in many cases, proves fruitless.[1]

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[1] *English Law and the Renaissance*, pp. 27, 28.

[2] A valuable account of the Year Books in general is given in Maitland, *Year Books of Edward II.*, vol. i., pp. ix–xx. (Selden Society, vol. xvii.).

[3] Gross, *Sources and Literature of English History*, p. 450.

[4] "Are they not the earliest reports, systematic reports, continuous reports, of oral debate? What has the world to put by their side? In 1500, in 1400, in 1300, English lawyers were systematically reporting what of interest was said in court. Who else in Europe was trying to do the like, to get down on paper and parchment the shifting argument, the retort, the quip, the expletive? Can we, for example, hear what was really said in the momentous councils of the church, what was really said in Constance and Basel, as we can hear what was really said at Westminster long years before the beginning of 'the conciliar age'?" "The Year Books contained more medieval conversation than had survived in any other authentic source."—H. A. L. Fisher, *Frederick William Maitland*, p. 164.

It has been shown how the law of England was made a common law to all freemen and all localities; how it was shaped by the people, their legal garment made bit by bit and fitting into the national character; how it was "toughened" by teaching and the unbroken yearly record of its application. In the middle of the sixteenth century, when England was passing into the full tide of Renaissance influence and worship of the Roman law was at its height in Europe and *receptions*[2] were the order of the day, the vitality of English law was put to a severe test. From the middle of Henry VIII.'s reign to the early part of Elizabeth's, there were many evidences of its decline. Other European countries received the Roman law because their old law was not a *common* law, was not a vital, growing law with a hold upon the people, in short, because it was an impossible law for states advancing rapidly in unity and civilisation. As far as can be judged, England narrowly escaped a *reception*, for all the surface forces—and many of them were powerful—were working for it. But she escaped for the simple reason that she had a law that measurably sufficed her, a law with such deep and tough roots in the national life that to tear it away would have been a sort of national suicide. When England passed from the medieval into the modern, she did not, like some of her sister countries, leave the medieval law behind.[1]

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[1] But the number of such cases has been greatly lessened by the work of Pollock and Maitland which deals mainly with that century.

[2] The technical term for the adoption of the Roman law by a nation.

The political importance of this preservation of the old law can hardly be overstated.

> The English common law was tough, one of the toughest things ever made. And well for England was it in the days of Tudors and Stuarts that this was so. A simpler, a more rational, a more elegant system would have been an apt instrument of despotic rule. At times the judges were subservient enough: the king could dismiss them from their offices at a moment's notice; but the clumsy, cumbrous system, though it might bend, would never break. It was ever awkwardly rebounding and confounding the statecraft which had tried to control it. The strongest king, the ablest minister, the rudest lord-protector could make little of this "ungodly jumble."[2]

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[1] Maitland's brilliant lecture, *The English Law and the Renaissance*, should be read in this connection. It is with a sort of congratulatory enthusiasm, possible only to one who had entered so deeply into the life of the crotchety but salutary old system, that he speaks of its safe passage of the crisis and of its recovering strength. "When the middle of the century is past the signs that English law has a new lease of life become many. The medieval books poured from the press, new books were written, the decisions of the courts were more diligently reported, the lawyers were boasting of the independence and extreme antiquity of their system. We were having a little Renaissance of our own: or a gothic revival if you please. . . . That wonderful Edward Coke was loose. The medieval tradition was more than safe in his hands."—P. 29. "Sir Edward Coke, the incarnate common law," he calls him in another place, who "shovels out his enormous learning in vast disorderly heaps. Carlyle's felicity has for ever stamped upon Coke the adjective 'tough'—'tough old Coke upon Littleton, one of the toughest men ever made.' We may well transfer the word from the man to the law that was personified in him."—*Sketch of English Legal History*, p. 113.

[2] *Ibid.*, pp. 113, 114. Roman law had these same traits "during the ages of its growth, and it is well to remember that, as Roman law took on a more scientific form, and was reduced to an organised system, its life and power of growth ceased. History does not show any necessary connection between these two events; but certainly, if the formation of a scientific system on the basis of the English common law is to mean that our law and institution-making power is past, then every Anglo-Saxon may

A final struggle between king and people would probably have come in the seventeenth century even if the old law had been replaced by the Roman, "but it would hardly have been that struggle for the medieval, the Lancastrian, constitution in which Coke and Selden and Prynne and other ardent searchers of mouldering records won their right to be known to schoolboys,"[1] and one can hardly feel much hope for the people in such hypothetical conflict, the Stuart kings having the Roman law for their ally.

But to say nothing of the political side of the matter, of the absolute monarchy which the Roman law has been apt to bring in its train, it is probably well for us and for the world at large that we have stumbled forward in our empirical fashion, blundering into wisdom. The moral glow known to the virtuous school-boy who has not used the "crib" that was ready to his hand, we may allow ourselves to feel; and we may hope for the blessing which awaits all those who have taught themselves anything.[2]

In conclusion, a word needs to be said about the equity of the Court of Chancery and about statute law. Of the former it is only necessary to remark, by way of reminder, that English equity was, notwithstanding its adoption of new and important principles, essentially a supplement or appendix to the common law, and that because of it that law was much better fitted to meet the requirements of the sixteenth century and pass successfully the crisis which it then encountered.[3]

Statute law began nominally in the thirteenth century. But there had always been law made by the central government, by the king in his Council; and king and Council have continued, upon occasion, to make it. In the fourteenth century, a new law-making element, the House of

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most heartily pray that our law may long remain unscientific."—Adams *Civilisation during the Middle Ages*, p. 100, note 2.

[1] Maitland, *English Law and the Renaissance*, p. 30.

[2] Maitland in *Sketch of English Legal History*, p. 37.

[3] See above, pp. 218–225.

Commons, came into existence, and statutes, in something nearer the later sense of the word, were made by king and Parliament. Some acts of the thirteenth century are traditionally called statutes which are really ordinances, made by king and Council; and some had an anomalous origin and are, strictly speaking, neither ordinances nor statutes.[1] For several reasons Magna Carta has been regarded as the beginning of England's written law and holds first place in the statute book.[2] The informality of earlier legislation led to its rapid absorption in the mass of unwritten tradition.[3] But the events leading to Magna Carta and the document itself were extraordinary; by the frequency of its confirmation, it was kept before men's minds and its greatness seemingly enhanced; and under Edward I., a class of secular lawyers began to be interested in England's legal history. Yet the Great Charter is not a statute. It is largely a compact between king and barons, putting in writing certain parts of feudal custom which especially needed emphasis owing to John's abuses. It contains also sundry semi-feudal or non-feudal grants to other classes of people, and there are elements of compromise and bargain. It had immediate ends in view and aimed at restoring the customary law. It did not create new law, but in later years many of its clauses, often misunderstood, had a profound influence upon legislation.[4]

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[1] See further on the origin of statutes and their early relations to ordinances, below, pp. 412–419.

[2] The text in the Statutes of the Realm is that of the confirmation of 1225. "The text of the Great Charter issued the eleventh of February, 1225 (ninth year of Henry III.), is of exceptional importance. In the first place it is definitive and has never been modified (save in a single point of detail) in any of the official confirmations and copies which have been published since. It is the one text that has always been appealed to either in the courts or in the houses of Parliament, or in law books. In its form it approaches closely the redactions of 1216 and 1217, and therefore differs much from the act of 1215. The Charter of the Forest was renewed and confirmed at the same time. They are now the first statutes of the kingdom of England, the cornerstone of its written constitution."—Translated from Bémont, *Chartes des Libertés Anglaises*, pp. xxix., xxx.

[3] See above, p. 227.

[4] For further discussion of Magna Carta, see below, pp. 266–286.

Two acts of Henry III.'s reign have been called statutes: the Statute of Merton, 1236, and the Statute of Marlborough, 1267; both were probably products of king and great council.[1] There was still no system of keeping rolls and it was largely a matter of chance which acts were preserved and, of these, which were known as statutes.[2] But "statute rolls" began under Edward I. and the term has been quite generally applied to the important acts of his reign.[3] In making some of these, there was concerned one or other of the new elements which, with the evolving House of Lords, later formed Parliament. Also there was probably the beginning of the idea, which became prominent in the fourteenth century, that the function of the statute was the affirmance of the common law or the removal of some abuse which interfered with it, the statute thus sharing largely the permanence and fundamental nature of that law—an idea which by implication would limit the ordinance to something in the nature of a temporary administrative ruling. It was a transition period, and it is hard to say whether or not there was a new form of legislation. Be this as it may, the statutes of Edward I., the written laws made by the central government, have borne a most important and special relation to the common law. Coming just at the end of that law's rapid extension through new writs, they formed a new starting point and laid down principles upon which, with but little conscious creation, much new law was based and elaborated. Especially was this the case with land law. Such statutes as Mortmain, De Donis Conditionalibus, and Quia Emptores[1] were fundamental.[2] But such legislation was exceptional; in the two following centuries, the common law was left to elaborate itself, little important supplemental material being furnished by Parliament. In the Tudor period, important legislation began again and it has since steadily increased in quantity. Hence it might seem that all law-making power would finally pass to Parliament and that the independence of the judicial system, with its self-developing body of law, would end. But this has not proved to be the case.

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[1] It was in the assembly which made the Statute of Merton that the lay barons made their oft-quoted statement, "We refuse to change the laws of England." The clergy had been arguing for a change of the law to suit the canonical principle that children born before the marriage of their parents were to be counted legitimate after the marriage. Then came the recorded reply of the barons: *Nolumus leges Angliæ mutare*. See above, p. 183, for a provision of the Statute of Merton.

[2] By the beginning of Edward III.'s reign it was settled that nothing was to be entered on these rolls that had not the assent of king, lords, and commons. The legislative formula of a statute as finally worked out at the end of the middle ages is as follows: "The king our sovereign Lord Henry VII. at his Parliament holden at Westminster . . . by the assent of the Lords spiritual and temporal and the commons in the said parliament assembled and by the authority of the same parliament hath done to be made certain statutes and ordinances in manner and form following."

[3] "'Statutum' seems to be a popular rather than a technical term before the reign of Edward I., and it is possible that the non-technical employment of it may have survived longer in isolated cases to the confusion of the modern historian."—Professor McIlwain in *Magna Carta Commemoration Essays*, p. 140.

That the common law has been radically revolutionised by statute on some subjects in very recent times, as, for example, in real estate law, is not an evidence of the decline of this self-developing power. It is rather due to the rapid and revolutionary change in society itself, which demands equally rapid and revolutionary change in the law to accompany it. The statutes themselves are subjected at once to the ordinary process of common-law development in the interpretation and application of them made by the courts.[3]

Thus had England's common law—common law (in the narrower sense), equity, and statutes—remained incomplete and unscientific, but alive and growing; not a ready-made system brought in from outside and imposed upon the people, but made by the people and administered by them. The common law has been a potent ally of constitutional government.

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[1] These are also known as De Religiosis, Westminster the Second, and Westminster the Third. See A. and S., documents 40, 42, 45.

[2] "Blackstone, in order that he might expound the working of the law in his own day in an intelligible fashion, was forced at every turn to take back his readers to the middle ages, and even now, after all our reforms, our courts are still from time to time compelled to construe statutes of Edward I.'s day, and were Parliament to repeal some of those statutes and provide no substitute, the whole edifice of our land law would fall down with a crash."—P. and M., i., xxxiv.

[3] Adams, *Civilisation during the Middle Ages*, p. 100, note 1. "In the United States, the existence of a written constitution as fundamental law has led to a most important and valuable extension of this principle in the power which the courts have assumed, without express sanction, to declare a law regularly passed by the national legislature unconstitutional and therefore null and void."—*Ibid.*, p. 100.

5. **Relations of the State Courts and the Church Courts.**— In the later middle ages in all the countries of western Europe, lay jurisdiction was more or less invaded by that of the church.[1] The discussion of the English court system cannot be concluded without notice of the causes and extent of this invasion in England and its bearing upon the effectiveness of the judiciary. In the Anglo-Saxon period, there had been no such invasion; this was because England was not touched by the increased church unity and influence resulting from the Carolingian patronage and the pretensions of the forged Decretals. Criminous clerks were tried in the popular courts; litigation between clerks and between clerks and laymen and the enforcement of many of the laymen's ecclesiastical obligations found place there also. Only for holding clerks to their clerical duties, did anything in the nature of an ecclesiastical court exist, although there seems to have been an occasional attempt to close civil differences between clerks by extra-judicial arbitration.

It has been seen how, by the Conquest, England was brought into the current of continental influence, and how this immediately showed itself in the church, checked only by the Conqueror's will.[1] The most striking of the early results of this influence was the so-called separation of the lay and ecclesiastical courts. At some time between 1070 and 1076, William, stating that the episcopal laws had not up to his time been observed in England according to canonical principles, ordained:

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[1] "Starting from the words of the apostle against going to law before unbelievers, growing at first as a process of voluntary arbitration within the Church, adding a criminal side with the growth of disciplinary powers over clergy and members, and greatly stimulated and widened by the legislation of the early Christian emperors, a body of law and a judicial organisation had been developed by the Church which rivalled that of the State in its own field and surpassed it in scientific form and content."— Adams, *The History of England* (1066–1216), pp. 278, 279. It will be useful, in this discussion, to keep in mind that the church drew cases to its courts upon two general grounds: something clerical about the parties to a suit, or something clerical about the suit itself. Now clerical persons might do unclerical deeds and unclerical persons could litigate few causes in which ingenuity might not discover some trace of the clerical. With this double hold, there was opened up before the church a jurisdictional vista practically without end.

> . . . that no bishop or archdeacon shall any more hold pleas of episcopal laws in the hundred or bring to the judgment of secular men a cause which pertains to the rule of souls, but whoever shall be impleaded according to the episcopal laws for any cause or fault, let him come to the place which the bishop shall choose and name for this, and there let him answer for his cause or fault, and not according to the hundred, but according to the canons and episcopal laws let him do right to God and his bishop. However, if anyone lifted up by pride shall scorn or refuse to come to episcopal justice, let him be summoned once and a second and a third time; but if neither so will he come to amendment let him be excommunicated, and if there be need for enforcing this, let the power and justice of king or sheriff be furnished. And he who summoned to the bishop's justice refuses to come shall satisfy the episcopal law for each summons. This also I prohibit and by my authority forbid, that any sheriff or reeve or minister of the king or any layman shall interfere with laws which pertain to the bishop, or that any layman bring another man to judgment without the justice of the bishop. And let judgment be passed in no place except in the episcopal seat or in that place which the bishop shall appoint for it.[2]

This shows, first, that laymen, as well as clergy, were now to be tried before church courts for breaches of church law; second, that laymen were forbidden to concern themselves with the administration of church law or, for an offence against it, to bring any one to a court other than the bishop's; but that, third, the authority of the king might be exerted to enforce the bishop's summons. William assumed that it was clear to every one what breaches of church law were. There is certainly no hint from his reign of "any immunity of clerks from secular jurisdiction or temporal punishment." Simply, the old local courts no longer dealt with laymen's failures to meet their church obligations.

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[1] See Part II., § IV.

[2] Latin text in Stubbs, *Select Charters*, pp. 99, 100.

Between the time of this ordinance and the famous controversy between Henry II. and Becket, the jurisdictional claims of the church made a great advance. It was then that there took place in England what has been aptly called the "reception of Gregorianism." This might easily be taken to mean too much, but the English church did become deeply and lastingly affected by the principles of the great pope; and such a change in so important an element of the population necessarily touched the government, and that most markedly in the judiciary. The unknown author of the *Leges Henrici Primi*, writing under Henry I., said that all ordained clergy "are to be accused before their prelates for all crimes, both the greatest and the lesser." This writer borrowed so much from continental principle and practice that it is hard to tell how far this reflects English custom in his time. But there is reason to believe that it is not wholly contrary to fact, and it may safely be concluded that there was some attempt, in Henry I.'s reign, to accuse and try criminous clerks in the bishop's court. William's ordinance said nothing about criminous clerks, and he unquestionably intended, at the time of its issue, that they should be dealt with as they always had been in England; for it was clearly concerned with changing Anglo-Saxon and not Norman practice. But it should be noticed that there were three distinguishable parts in the criminal procedure: accusation, trial, and punishment. William had come from the continent and dealt with prelates who, for the most part, had had a continental training; and, apart from what this particular ordinance said or did not say, Maitland thinks it very possible that Lanfranc would have demanded and the Conqueror conceded the general principle that the *trial* of the accused clerk must take place before the spiritual forum; [but doubts] whether more than this would have been conceded or even demanded, whether as much as this could always be obtained.[1]

If the accusation were in a lay court, a sort of possession of the case was obtained which made possible a share in the punishment. The church could not pronounce a judgment which involved loss of life or limb; hence it was essential to the peace of the country that the civil authority be able to supplement, in case of heinous crimes, the church's degradation of the clerk. It is significant that no one denied Henry II.'s claim that the procedure he advocated was the actual practice in the time of his grandfather.[2] We may venture, then, to sum up the competence of the church courts during the three Norman reigns. They had jurisdiction over all clergy and laymen in matters falling within the domain of the canon law, and, by their interpretation, that domain spread and many civil cases were being drawn from the lay courts. They had the trial of ordained clergy who had been accused of crimes in the lay courts, and, in cases where a blood judgment would have been rendered in a lay court, turned the degraded clerk over to the secular arm for further punishment. But there must have been many exceptions to this rule, if one may venture to call it such; there were probably instances in which criminous clerks had accusation, trial, and sole punishment in the church court, and it is certain that in some cases the church did not even get the trial.

In the reign of Stephen, the church courts made their highest pretensions and attained their widest jurisdiction. Stephen's temperament and the circumstances of his succession led him, early in his reign, to make broad and unwise promises to various individuals and classes. His

[1] P. and M. i., 454.

[2] See below, pp. 247–249.

second charter, which he felt under the necessity of granting the spring after his coronation, was largely occupied with concessions to the clergy. He gave them all they wanted, and along a variety of lines.

> The English Church would have reached at a stroke a nearer realisation of the full programme of the Hildebrandine reform than all the struggles of nearly a century had yet secured in any other land, if the king had kept his promises.[1]

In the matter of ecclesiastical jurisdiction, he said:

> I permit and confirm justice and power over ecclesiastical persons and all clerks and their effects, and the distribution of ecclesiastical honours to be in the hands of the bishops.[2]

This certainly brought the accusation of the clerk, as well as the trial, within the church court and was a grant of civil jurisdiction in all that pertained to church property.

But Stephen did not keep his promises. He struggled stoutly against the concession about criminous clerks, and it is known that there were instances in his reign in which criminous clerks were accused, tried, and punished in the king's court. On the whole, however, the church was more successful in the contest than the king. In civil jurisdiction, the church went far beyond what was contemplated in the charter, for such jurisdiction was gained

> not only in the purely spiritual causes, as for example matters relating to matrimony and contentions over land held in frankalmoin, but also the investigation as to whether a piece of land pertained to frankalmoin, cases concerning wills, tithes, *advowson* or presentation to churches, and contracts secured by an oath.[3]

The great work of Gratian, known as the Decretum, appeared about 1142. This was a fruit of the twelfth-century revival in the study of Roman and canon law.

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[1] Adams, *The History of England* (1066–1216), p. 201.

[2] A. and S., p. 8.

[3] Translated from Böhmer, *Kirche und Staat*, pp. 399, 400

Gratian was a monk of Bologna, the centre of the revival, and was a teacher in the law school there. Church law had been very disorderly, and his was the first important attempt to codify it. Such codification and clarifying as Gratian gave it could not but increase its availability, heighten its authority, and stimulate the already expanding church courts. The Decretum came at a time when England was especially open to its influence. So many things were working to the same end that England, long exceptional in the nationality of her church and her independence of the pope, was no whit behind France or Italy in her progress towards the Gregorian ideal.

When the great ruler and lawyer, Henry II., came to the throne, he had to face the results of nineteen years of weak rule, many of them of sheer anarchy. It is only to be noticed here how he dealt with the advancing jurisdictional claims of the church, which Stephen's reign had so favoured. Four considerations go far to account for Henry's action when, in 1163, he was at last free to look into England's internal abuses. First, he found criminous clerks no small element in the horde of unpunished criminals who were making governmental progress impossible: "it was said that a hundred murders had been perpetrated by clerks during Henry's reign before the king took action."[1] Second, he was conscious of the crippling of government that must follow if men belonging to an organisation so independent of, and out of harmony with, the state could control a vast civil jurisdiction. Third, he genuinely appreciated the good government of his grandfather's time, and proposed to make it his model in his work of restoration. Fourth, the ideas of his time were not without their influence upon him and he had a great respect for established law; he probably respected Gratian's Decretum; at any rate, as his struggle with the church drew on, he may have seen the strategic advantage of being able to claim harmony with it.

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[1] P. and M. i., 454, note 1. It is not to be supposed that the higher clergy or many of the priests or even deacons were committing heinous crimes. They were committed by those in the lowest clerical orders, who took such orders as the concomitant of a minimum of education, and most of whom probably did not look forward to the life of a priest. But they formed a part of Henry's great peace problem. See above, pp. 144, 145.

Some flagrant miscarriages of justice with respect to criminous clerks were the immediate cause of Henry's action. His preliminary negotiations with Archbishop Thomas and the bishops indicate that the practice of inflicting lay punishment upon the convicted and degraded clerk had largely lapsed under Stephen, for he received very unsatisfactory replies when he demanded the attitude of the clergy upon this point. Becket took an extreme position, and must have seemed to Henry to be distinctly heading a state within a state. Late in 1163, Henry instructed some of the elder barons of his court, who supposedly knew the customs of his grandfather's time, to draw up a statement of such customs as bore upon his controversy with the church. The result was a document of sixteen articles, presented at a meeting of the great council at Clarendon in January, 1164. It is known as the Constitutions of Clarendon.[1] While not strictly confined to the points of judicial controversy between church and state, those points are the most prominent in the document. In the third article, is a statement of the most crucial matter, the procedure in the case of criminous clerks. The language is brief and somewhat obscure, but Maitland's interpretation is now generally accepted and seems conclusive:

> A clerk who is suspected of a crime is to be brought before the temporal court and accused there; unless he will admit the truth of the charge, he must in formal terms plead his innocence; this done, he will be sent to the ecclesiastical court for trial; if found guilty he is to be deposed from his orders and brought back to the temporal court; royal officers will have been present at his trial and will see that he does not make his escape; when they have brought him back to the temporal court, he will then—perhaps without any further

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[1] A. and S., document 13, and W. and N., pp. 370–375.

trial, but this is not clear—be sentenced to the layman's punishment, to death or mutilation.[1]

Becket objected to three parts of this procedure: the preliminary hearing in the lay court, the sending of the royal officer into the church court, the infliction of the layman's punishment upon the deposed clerk. The first two of these were clearly contrary to the Decretum; but Henry felt that he had conceded all that he could when he allowed the canonical trial, and seemed disposed to emphasise the fact that he was not contradicting the canon law. These were all important points, but the question of punishment was vital. Becket rested his objection upon the principle that a man should not be punished twice for the same offence. But the Decretum does not seem to contemplate the case under consideration in connection with that principle, and Becket was quite original in his application of it and in the prominence which he gave it. He argued that degradation was the extreme punishment of the church and was sufficient for the first offence; if the man committed a second crime, he did it as a layman and would receive the layman's punishment. Henry regarded it as subversive of law and order to allow every clerk to commit one crime for which there was no adequate punishment. There was small chance of their coming to an agreement. Henry's position was substantially correct historically; it represented the practice of his grandfather's time. Becket's position was correct canonically, with the probable exception of the matter of punishment. Henry's position was certainly in harmony with the requirements of good government.

In the Constitutions of Clarendon, Henry not only attacked the church's claim to exclusive jurisdiction over clerks, but also its claim to some important civil actions. In the first article, he demanded all advowson cases. In the ninth article he drew into his court a preliminary procedure in cases where there was litigation over land between clergy and laymen, and this procedure later grew into an independent assize.[1] In article fifteen, he declared that "pleas of debt due under pledge of faith or without pledge of faith are to be in the king's justice."[2]

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[1] P. and M. i., 448. For a full discussion, see Maitland, *Roman Canon Law in the Church of England*, essay iv.

Henry was put in the wrong by the murder of Becket and was forced to renounce, or seem to renounce, what he had claimed in the Constitutions. A chronicler thus recorded this abjuration: "He also swore that those customs inimical to the churches of his land which had been brought in in his time he would utterly do away with."[3] Considering his former claim that these customs were all those of his grandfather's time, this does not appear to have been a very thorough renunciation.

From Henry's time, there was a decline from the Constitutions of Clarendon in the royal control over the trial and punishment of criminous clerks; while in civil jurisdiction, the kings not only kept in their courts what was then claimed, but continued to draw business away from the church courts. On the latter subject, nothing further needs to be said here, for at an early date the civil jurisdiction of the church ceased seriously to hamper that of the state.[4] But notice must be taken of the immunity of the clergy from lay jurisdiction, for it proved a serious breach in the efficiency of the English government until the Reformation. Becket was murdered in 1170 and Henry was reconciled to the church, through his abjuration and other engagements into which he entered, in 1172. After the murder, it was impossible for him to enforce his claims over criminous clerks; the matter was passed over in silence. In the years that followed, however, the clergy got into some logical difficulty by having it pressed home to them that if the clerical murderer of a layman could escape punishment by death, there ought to be reciprocity and the lay murderer of a clerk enjoy the same immunity. The fact that Becket's murderers were unpunished lent some point to this argument. The clergy began to feel uncomfortable, doubting whether their lives were safe. This situation made it possible for Henry, in 1176, to gain a concession; but in doing this he was forced to a more formal allowance of the church's claims over criminous clerks than he had yet made. A papal legate was in England at the beginning of the year, and he conceded that Henry could try clerks in his own court for forest offences; on the other hand, he received a letter from Henry to the pope in which the king agreed that murderers of clerks should not be exempt from punishment, and that, except for forest offences and cases which grew out of a clerk's holding a lay fee with a lay service attached, no clerks should be brought in person before his courts.[1] This concession may be regarded as formally inaugurating "benefit of clergy."

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[1] See above, pp. 145, 146.

[2] Cases in which the debt had been secured by an oath were being taken by the church courts on the ground that the church was the guardian of oaths. See above, p. 241, note 1.

[3] *Gesta Regis Henrici Secundi Benedicti Abbatis*, i., 33.

[4] ". . . still the sphere that was left to the canonists will seem to our eyes very ample. It comprehended not only the enforcement of ecclesiastical discipline, and the punishment—by spiritual censure, and, in the last resort, by excommunication—of sins left unpunished by temporal law, but also the whole topic of marriage and divorce, those last dying wills and testaments which were closely connected with dying confessions, and the administration of the goods of intestates. Why to this day do we couple 'Probate' with 'Divorce'? Because in the Middle Ages both of these matters belonged to 'the courts Christian.'"—Maitland and Montague, *Sketch of English Legal History*, pp. 41, 42.

The precise terms upon which the clergy enjoyed their "benefit" varied from age to age, but, in general, they became more lax. The core of "benefit of clergy" was this: when an accusation was brought against a clerk in a lay court, his bishop might appear and demand that he be turned over to the church court for trial; bishops regularly made this demand, and there could be no further punishment than the church courts were competent to inflict.[2]

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[1] Adams, *The History of England* (1066–1216), p. 319.

[2] The strangest factor in the survival of this practice in England is that it was out of harmony with the best authority in the church itself. Maitland says: ". . . that opinion, though owing to his (Becket's) martyrdom it was suffered to do immeasurable mischief in England by fostering crime and crippling justice, was never consistently maintained by the

In the thirteenth century, the clerk who had been arrested by the sheriff was imprisoned by the bishop until the coming of the itinerant justices, when he actually appeared before them and was accused. Late in the century after accusation and transmission to the bishop's court, the justices submitted his case to a jury and obtained a verdict. This was not his trial, but if the verdict were guilty his property with its income was held for the king until his fortune in the bishop's court were known. But the ecclesiastical trial became a farce. Compurgation was still used, an antiquated form of proof that, under the changed conditions, had lost what little virtue it had ever possessed as a method of ascertaining the truth.[1] It was especially useless when a clerk selected the compurgators from his own order. The church might inflict severe punishments, as life imprisonment; but such seem to have been seldom used.

There were still, in the thirteenth century, some valuable limitations to benefit of clergy: the privilege had not been extended to the lower orders of the clergy, where most clerical crime lay, but was confined to ordained clergy, monks, and nuns; the worst forms of treason were not within its operation; and, in the lighter offences, the misdemeanours, clerks were dealt with as laymen. But

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canonists; had it been maintained, no deposed or degraded clerk would ever have been handed over to the lay power as a heretic or a forger of papal bulls. As a general principle of law, Becket's theory about double punishment was condemned by Innocent III.; the decree which condemns it is to this day part of the statute law of the Catholic church."—P. and M. i., 455.

[1] Besides its use in the ecclesiastical courts, compurgation continued in the old local courts, its strongest hold being in the boroughs. It is interesting that in London it was much affected by jury practice, with the result that compurgators were not to be chosen by the accused himself, nor were any of them to be related to him by blood or marriage; while on the other hand he might challenge them for reasonable cause. It could also be used in personal actions in the king's courts, and in real actions it was used in incidental questions, such as the denial of the summons by the tenant. Certain actions in which the defendant might have recourse to compurgation could be brought in the nineteenth century. But such actions were avoided; means had been provided for bringing others in their place. Compurgation was prohibited by statute in 1833. See Thayer, *Evidence*, pp. 25–28, 34.

before the end of Edward III.'s reign, benefit of clergy had acquired most of the well-known characteristics which have made it approbrious: its extension to the lower clerical orders, the right of the clerk to prove his clergy even if his bishop refused to demand him, and the farcical method of proof by reading.[1]

> One of the worst evils of the later Middle Ages was this "benefit of clergy." The king's justices, who never loved it, at length reduced it to an illogical absurdity. They would not be at pains to require any real proof of a prisoner's sacred character. If he could read a line in a book this would do; indeed, it is even said that the same verse of the Psalms was set before the eyes of every prisoner, so that even the illiterate might escape if he could repeat by heart those saving words.[2] Criminal law had been rough and rude, and sometimes cruel; it had used the gallows too readily; it had punished with death thefts which, owing to a great fall in the value of money, were becoming petty thefts. Still cruelty in such matters is better than caprice, and the "benefit of clergy" had made the law capricious without making it less cruel.[3]

The state did occasionally break through the privilege in specially flagrant cases, and was even assisted by the church in doing so; but with slight exception the abuse remained as described until acts in the reigns of Henry VII. and Henry VIII., and later, did much to abolish it. It was long after these acts before it entirely ceased.[4]

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[1] Reeves, *History of the English Law*, ii., 324–326; 428–430.

[2] The "neck-verse" was the beginning of the fifty-first psalm: "Have mercy upon me, O God, according to thy lovingkindness: according unto the multitude of thy tender mercies blot out my transgressions."

[3] Maitland and Montague, *Sketch of English Legal History*, pp. 72, 73.

[4] "In 1496 a statute deprived all but ordained clerks of benefit of clergy, in case of wilful murder. Other statutes follow which take away clergy from all men in particular cases—thus in 1536 certain piratical offences, in 1547 highway robbery, horse-stealing, stealing from churches, in 1576 rape—and so forth, and thus felonies are divided into two classes known as clergyable and unclergyable. Then again under an act of 1487 it was provided that a person not really in orders should have his clergy but once, and should be branded in the thumb, so that the fact of his conviction might be apparent. In 1622 . . . women for the first time obtained a privilege equivalent to the benefit of clergy."—Maitland, *C. H. E.*, p.

230. "But it lingered on until comparatively recent times, and even in cases where it was withdrawn from all others who had hitherto claimed it, an Act of Edward VI. saved it for 'a Lord or Peer of the Realm though he cannot read.' Readers of *Esmond* will remember the escape of Lord Mohun by this means from the penalties of his successful duel with Lord Castlewood."—Medley, *English Constitutional History*, p. 611. Benefit of clergy was abolished by statute in 1827.

SECTION II

THE EXECUTIVE

THE courts of law dealt with criminal charges and civil actions, and Parliament came finally to be the main source of general legislation: of both courts and Parliament the king was a vital part, and their acts were expressions of his authority. But outside of them there was a large and not clearly defined sphere of action for the king—for the king acting through his Council or some more special organ of administration or some official. And as an increasingly professionalised bench or an aristocratic element in Parliament might more or less consciously contest the ground with the king for the substance of power, so in this third sphere he had to meet a distinctly baronial advance. This sphere is usually referred to rather vaguely as the executive or administrative side of government. These terms mean something in modern political life and they probably mean something for the period with which we are dealing. But, wrote Maitland, they

> suggest that the work in question consists merely in executing or administering the law, in putting the laws in force. But in truth a great deal remains to be done beyond putting the laws in force—no nation can be governed entirely by general rules. We can see this very plainly in our own day—but it is quite as true of the middle ages:—there must be rulers or officers who have discretionary coercive powers, power to do or

leave undone, power to command that this or that be done or left undone.[1]

In view of the breadth and character of this work, he suggests *governmental* as a better descriptive term than *executive* or *administrative*. But that, on the other hand, might easily seem to include all of the state's activities. His statement, however, emphasises, as should be done, what the king did in the middle ages apart from courts of law or Parliament. The extent of the king's authority in general and these activities in particular form the subject of this section.[2] Yet there was no thought that the so-called executive powers were solely the king's or that he had no others. It will be seen that Parliament came to touch the administration at important points and also remained a court, and king and Council were never devoid of legislative or judicial powers. These categories of government were more fused than separated. Language constantly leads us astray. But we must use such language as we have as best we can, and, while repressing yearnings for definition, try to live in the time and see how kings and others strove to meet the problems of ordered society.

1. **The Genesis of Limited Monarchy.**—The courts were the king's; they were his achievement, working skilfully and masterfully upon the material at hand. Before going on to a consideration of his other work in government, it is necessary to notice that long before the end of the middle ages the king could not do as he pleased in the sense that William the Conqueror could. He was limited. The principle had become established that the king was under the law, and there were elements in the population that knew it was their interest and

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[1] Maitland, *C. H. E.*, p. 196.

[2] An important part of this has already been taken up in connection with the king's appointive officials, the justices of the peace, the local magistracy. They were judges and held most important courts of law, but at the same time, as has been shown, they were general administrative officers.

believed it to be their function to keep him under. The administrative system which he built was not the administrative system of a despot, and the Parliament which he called into existence came finally to identify itself with the nation.

After William I. had conquered England and the early attempts of the English to throw off the yoke had been put down and enough time had passed to bring out the nature of his government, certain of his subjects began to show much resentment and disappointment. In one sense, they were not his subjects; they were his vassals. They were bound to him by the private tie, the feudal contract, rather than the public tie which relates the subject to the state. Indeed, at that time there was little of this public relation in its purity. The men of the great servile class were under various obligations to their lords which made it impossible for them to hold any full relation of subject to a sovereign state; the vassals of the king's vassals had private contracts with their lords which made their relations to the king only mediate. The object of the Salisbury oath was to bring all freemen under immediate obligation to the sovereign, but it could only accomplish its purpose slowly. The non-noble freemen were the only people who approximated to our conception of subjects. But they were not the ones to resent William's government. Free as they were, they were more concerned with the rule of their own Norman or Saxon overlords, who, notwithstanding the definite terms of their service, might oppress them in many ways.

It was not, however, because the lower classes were less closely related to the king that they did not resent his severity; it was because there was, for them, no such definite source in law or precedent whence the idea of resistence could come. The German barbarians had found no such thing in the Roman empire; there power was all on the side of the state and obligation all on the side of the individual. It was essentially the same in the empire of Charlemagne; and that empire had fallen to pieces, not because of any constitutional attack upon it, but because emperors and subjects alike had been unable to maintain their Roman imitation. In the ruins of this empire, there grew among the upper classes a set of relations, termed feudal, in which lord and vassal were bound to each other by a contract freely entered into and entailing mutual obligations.[1] If one of the parties to the contract broke it, the other might try to force him to keep it or might regard the relation as dissolved. Indeed these military contracts were distinctly the source of the principle of armed resistance to wrong. A baron was a sovereign with respect to his men and his fiefs; hence "such common arrangements as had to be made in medieval society had to be effected on the same lines as modern international conventions." The king could declare his will only in his own demesne; if it touched the territory of his vassals it must have their consent. But the sovereign barons were far from being of equal influence, either in the feudal court or outside, and in England the suzerain's voice was very influential. Some barons were much greater than others—"voices were rather weighed than counted"—and the majority principle was not yet. It depended on circumstances and place whether, in feudal society, the pull was towards the centre, the king's control, or the circumference, feudal licence. As transplanted in England it was towards the centre; in the Latin Kingdom of Jerusalem towards the circumference.

William the Conqueror did not turn out to be the kind of king that his vassals had expected; he did not treat them as the French kings treated their vassals. He did not consciously modify feudalism when he came into England or deliberately undertake to weaken his vassals. But he was as strict and stern a king in England as he had been duke in Normandy; he was great enough to play the same part on the larger stage. His followers seem not to have expected this; they thought he would be like other kings and they like other king's vassals. He found in the English sheriff a means to accomplish things in the localities and he instructed him to hold pleas involving royal interests even within the holdings of great lords. The profits of this jurisdiction went to the king and lessened the judicial income of the vassal. Peace was maintained, and the rights of private warfare, which surely, it was thought, belonged to a king's vassals even if not to a duke's, were rigidly suppressed. Many of William's vassals felt that what he was doing amounted to a breach of his contract. They rose against him, and, despairing of making him recognise their rights, they purposed to break all relations with him and drive him from the land. Thus occurred, in 1075, the first true feudal revolt in England. It was a revolt not against William as king, but as suzerain. It was the first of a series of such revolts which lasted with little change in character for about a century. The barons had to learn in England, as a result of the king's power, "a lesson foreign to their class anywhere else in the world of that time, the lesson of combination with one another." In France combinations of the barons were much less common. There they could hope for independence and looked on one another as rivals. They fought one another as well as the king. Hence their risings had "more of a personal and less of a public character."[1]

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[1] See above, Part I., § II., 1.

When William II. came to the throne, he not unnaturally had a revolt of these barons on his hands at the very outset. It is interesting that he began to make verbal promises of good laws, especially a mitigation of the forest laws. He did this in order to gain the support of the English and of as many Normans as possible. But during his reign, with the help of Flambard, he broke feudal custom in more specific and exasperating ways than his father. Dues and the rights of overlords with respect to marriage, wardship, and other feudal incidents were becoming fixed by custom, and hence were covered by the feudal contract without specific mention. These he abused beyond measure, and the rising of the northern nobles under Mowbray in 1095, generally known as Mowbray's revolt, was of the same feudal type as the preceding. It ended in the same way, a royal victory. These Norman kings were strong, and so slight was racial or national feeling that they had the support of the Anglo-Saxon lower classes. This was the normal medieval alignment. The king, standing for some degree of law and order, had the support of the church and of the cultivators of the soil, who had more to fear from the local tyrant than from the distant one: the lay noble's hand was against every man and every man's hand against him.

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[1] Adams, *Civilisation during the Middle Ages*, pp. 334, 335.

But another line of development was springing up alongside that just noted, and grew out of the Conquest. The Norman kings of England, mighty as they were, were forming the habit of making formal, public promises. It was natural that William the Conqueror, in maintaining the fiction that he was the lawful successor of Edward the Confessor, should take the coronation oath of Anglo-Saxon kings—the threefold promise to protect the church, to rule justly, and to do away with wrongs. But the special circumstances of his coronation could not be wholly overlooked, and he appears to have added to the oath "that he would govern this nation as well as any king before him had best done, if they [the people] would be faithful to him." Before 1075, came his short charter to London, the beginning of written promises to municipalities in England.[1] William II. also used the old coronation oath, and he also added to it in a way that seems to admit some dissatisfaction with his father's rule or a craving of suspended judgment for his own. He also sought Lanfranc's needed support by a promise to be guided by him in all matters. In recruiting help to put down the revolt of 1088, he made lavish promises. Says the Anglo-Saxon Chronicle,

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[1] Stubbs, *Select Charters*, p. 97.

> He then sent after Englishmen and told them his need, and desired their support, and promised them the best laws that ever were before in this land; and every unjust impost he forbade, and granted to men their woods and liberty of the chase, but it stood no while.

In a severe illness in 1093 William believed he was at the point of death, and apparently in terror at his own misdeeds he made a formal promise of a sweeping character. This act is described by a contemporary:

> An edict was published, confirmed by the royal seal, that all captives in all parts of his dominion should be released, that all debts should be irrevocably remitted, that all abuses hitherto inflicted should be done away with forever. Moreover, there were promised to all people good and holy laws, maintenance of uncorrupted justice, and such a severe investigation of wrongs as would deter others.

This account, by a very intelligent and reliable chronicler,[1] shows a written promise, something in the nature of a general edict or charter, and contains what is essentially an acknowledgment by William that others had rights as against him. The tide of promises was rising. This was the background when a most sudden emergency brought Henry I. to the throne. Under the circumstances he had every motive to issue a set of written promises. His brother's abuses were specific and notorious; they broke the spirit and the letter of the tacit contract which bound every lord and vassal; they had outraged a part of the population which could be easily reached and appealed to by a formal charter; they were susceptible of a clear, contractual statement. But not only did Henry's situation cry out for a charter at the time of his coronation—other kings and in other countries had come to the throne when such a set of formal promises might have been good for them—but there was here in the history just preceding, the working out of the promise idea into the written charter; when the emergency arose at Henry's sudden succession the developed idea was there, ready to be seized upon and used. And so Henry I.'s charter of liberties was conceived and brought forth—a great charter, as it was sometimes called, until a greater took the name.[1] In the multiplication of originals of this charter and in the provisions made for their safe-keeping there is evidence of the high value set upon it and a purpose that knowledge of it should not be lost.[2]

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[1] This was Eadmer. For the passage cited see Stubbs, *Select Charters*, p. 109. The text of William II.'s edict has been lost; we know of it only through the chronicler. It is interesting that Eadmer's account of Henry's charter is very similar to his account of William's. If Henry's had been lost we should have the same knowledge and opinion of it we now have of William's.

This charter made very definite promises to correct specifically mentioned feudal abuses of William. In the reaction bound to follow his brother's reign, Henry thus emphasised, either through necessity or policy, his contractual relation to his tenants-in-chief. But throughout his reign, he was strong enough to break his promises freely, and there was no revolt except the inevitable exploratory one at the beginning of his reign which resulted so disastrously to his enemies. Yet the very regularity of his tyranny, while rather extending the powers of the crown, tended also to strengthen the contract idea; he was not capricious; with respect to a portion of his population, he was acting upon a recognised set of principles.[3]

When Stephen came to the throne, he felt it necessary to strengthen his doubtful claim by a brief confirming charter. He merely confirmed "the liberties and good laws," with no mention of their having been abused and with no specific points of correction.[1] A few months later, he found it necessary to gain the support of the church by a charter which made very sweeping concessions.[2] The church included a class necessarily in close, but often ill-defined, relations with the king. Stephen limited his power by allowing the church a greater independence than it had ever had; two rather vague clauses were probably intended to concede the investiture rights reserved by Henry I. in his compromise with Anselm and the trial of criminous clerks. Stephen was a great promiser but a bad fulfiller of promises. He purchased the support of individuals and of all sorts of groups with promises. The contract idea was common as in no reign before, but it was abused and made commonplace. The barons steadily gained power from the crown, his reign was one long feudal revolt, and they built castles, coined money, and waged private war—things anathema in the reigns before. For the first time—and the last—there was thorough-going feudal license in England.

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[1] A. and S., document 7; W. and N., pp. 367–370.

[2] See Poole, *The Publication of Great Charters by English Kings*, English Historical Review, xxviii., 444–453. On the origin of Henry's charter, see H. L. Cannon, *The Character and Antecedents of the Charter of Liberties of Henry I.*, American Historical Review, xv., 37–46.

[3] Much more was this the case if we accept the statement of Stubbs that the coronation charter was "probably reissued from time to time as he found it necessary to appeal to the sympathies of the people against their common enemies."—*Select Charters*, p. 116.

Henry II., at his coronation, ignoring what had happened in the intervening reign, confirmed the laws and liberties of his grandfather in a general but emphatic charter, and mentioned Henry I.'s having granted these in charter form.[3] The rapid progress of centralisation under this king, especially in the foundation of the king's

[1] A. and S., document 10.

[2] *Ibid.*, document 11.

[3] The text of this charter reads: "Henry by the grace of God King of the English, duke of Normandy and of Aquitaine, and count of Anjou, to all earls, barons, and his faithful French and English greeting. Know that I to the honour of God and of holy church and for the general betterment of my whole kingdom have granted and restored and by my present charter confirmed to God and holy church and to all earls and barons and to all my men all the concessions, grants, liberties, and free customs which King Henry my grandfather gave and conceded. Likewise also all the evil customs which he removed and gave up, I give up and grant shall be removed for myself and my heirs. Wherefore I will, and firmly command that holy church and all earls and barons and all my men have and hold all those customs, grants, liberties, and free customs, freely and quietly, well, in peace, and fully, from me and my heirs for them and their heirs, as freely, quietly, and fully in all respects as King Henry my grandfather gave and conceded and by his charter confirmed to them. Witness Richard de Luci at Westminster." See Latin original in Stubbs, *Select Charters*, p. 158.

court system, has been noted.[1] He hit feudalism in the old way, forbidding private castles and garrisons and fighting in anyone's quarrel but the king's, and in the new way of a suddenly increased assault upon the feudal court revenue. In 1173, began the last purely feudal revolt in England, almost a hundred years after the first one. Again the understood contract between lord and vassal—whose content varied from age to age, but was always a reality—had been broken and the barons made an unsuccessful attempt to hold the king to its terms. By the close of Henry II.'s reign we have this interesting but explainable paradox: the kings of England were stronger than the kings elsewhere in Europe, and yet they were the only kings who made formal, written agreements when they were crowned. In addition to the points brought out in the foregoing sketch it should be noted here that there had not been one primogenitary succession to the English throne since the Conquest—not that anyone had opposed primogeniture as such, but the chances of family circumstance and personality had ruled that way. Primogenitary successions would not be favourable to coronation agreements; non-primogenitary successions, because more likely to be disputed, would.[2]

Richard I.'s succession was primogenitary, and there was no coronation charter. Also, probably in part owing to the crusading preoccupation, there was no feudal revolt then or throughout the reign. By the end of the twelfth century one party to the feudal contract, namely, the king, appears to have been so uniformly successful that all contract element was likely to pass away, and the king be limited with respect to no portion of his population. From 1066 to 1199, there had been but one weak reign; taking into account also the tremendous fact of the Conquest itself, one sees how absolute monarchy was being attained in England almost at a stride. The memory of past events was short in the middle ages. Would Henry I.'s charter be forgotten, and would English kings grow so all-powerful as to destroy their character as suzerains by continued, successful violation of much that that character implied? The fact that feudalism in many of its aspects was then waning in England looked towards an affirmative answer.

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[1] See above, pp. 144 ff.

[2] In France hereditary circumstance had been such that primogeniture had been the unbroken rule since the accession of the Capetian house in 987, and was to be for about a century and a half more. Twelfth-century kings in France were not nearly so powerful as English kings: there had been no Conquest and the average of royal ability was lower; but in the early firm establishment of the primogenitary rule later French kings found a great asset in their strife for power.

The issue was to be settled in John's reign, but an event late in the reign of Richard first demands attention. At the end of 1197, Richard commanded his English vassals to unite in providing a force of three hundred knights to serve him for a year on the continent. "The union of the military tenants to equip a smaller force than the whole service due to the lord, but for a longer time than the period of required feudal service, was not uncommon."[1] The constant necessity which the English kings were under of fighting upon the continent, while there was little need of fighting in England, was bound to suggest such expedients. This particular demand received a decided refusal from the bishop of Lincoln, a man of the highest character. His example was followed not only by many clergy, but by laymen. It was stated that the military tenants of England were not bound to render service outside the country, and Richard drew back before their united stand. There was no good feudal precedent for this in England or elsewhere; the letter of the law or custom was on the king's side. Yet it is not surprising that such a protest should have at length arisen. The English Channel lay between the king's English and French possessions; England was a natural unit. To use the feudal contract for a forty-day personal service as the basis for making English vassals regularly pay for soldiers to fight in Normandy or Aquitaine seemed a breach of the spirit of that contract—and that, too, whether the soldiers were mercenaries hired on the continent or equipped knights sent from England. But it was not a national resistance to taxation, as has sometimes been stated. There was, properly speaking, no taxation and no idea of constitutionality concerned in the case. The bishop of Lincoln based his stand upon specific customs and privileges of the church of Lincoln which he felt bound to uphold; and those who followed his lead had in mind their individual liberties, not a general notion of liberty. The significance of the episode lies in the fact that, upon the eve of John's reign, the contract idea in the English feudal population still had vitality.

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[1] Adams, *History of England* (1066–1216), p. 383.

If the authenticity of the reported speech of the archbishop at John's coronation could be trusted, rather sweeping conclusions might be drawn about the constitutional importance then attached to the election of a king. It is stated that the archbishop said on that occasion that no one had the right to succeed another to the throne on the basis of any foregone principle, but that he must be chosen by the whole realm, God's guidance having been asked; and it is further stated, that when privately asked later why he had said this, the archbishop answered that he had a premonition that John would at some time bring injury and confusion upon realm and crown, and lest he should have free rein in his evil course he had asserted that he was made king by election rather than by hereditary succession. The chronicler who wrote this did not begin his work until some thirty-five years after the event. But there is evidence that it was generally believed before John's death that the archbishop had made some such statement. While these ideas cannot be accepted for the occasion of John's coronation or for the year 1199, it is extremely important to note that such sophisticated notions of elective kingship were present and recorded in the first half of the thirteenth century.[1] However, it seems to have been a different train of events, connecting up with previous charter history, which led most directly to a limiting of the king's power.

Among John's abuses his perversion of scutage was notable; he took it at wrong times and in wrong amounts. He was making it less a strict commutation of feudal

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[1] How slender was the conception of elective monarchy in the Anglo-Saxon period has been noted above (pp. 46, 47). For more than a century after the Conquest, there were scarcely any definite principles of royal succession. There was an ill-defined but inclusive idea of heredity, with the addition of certain vague criteria of designation, age, general availability, recognition by the great men of the realm, etc. But each succession had its exceptional elements. William I. was king by conquest, but he did not venture to assume the crown offered him by Edgar and the great men until he had consulted, and received the assent of, his own Norman vassals. With the establishment of the Norman house, it seems to have been taken for granted that the crown was hereditary; it was often so spoken of. William II. was designated by his father, and made good his position by promptly seizing the treasury and gaining the support of Lanfranc. Henry I. gained the crown by prompt action upon the death of his brother, securing the treasury at Winchester and gaining the approval of the magnates and others who happened to be present. His coronation charter and his masterful personality secured his position. Stephen got the throne instead of the designated and direct heiress Matilda, by promptly going to England, while she remained on the continent. London supported him at the outset, and he gained one influential group after another through lavish promises. Much is heard of "election" in connection with his succession, but an examination of what actually took place shows that it meant a formal assent after a *quid pro quo*—not anything which we should regard as a constitutional election. Henry II. was looked upon as Stephen's successor before the latter's death because of the strong claims derived from his mother, a powerful ecclesiastical backing, his own manifest ability, the weakness of Stephen, and the death of Stephen's oldest son. Richard I. became king because, as Henry II.'s elder and abler son, there was no reason why he should not. Primogeniture, a principle which originated in feudalism in the inheritance of fiefs, was sure sooner or later to influence succession to the crown. It had long been the unbroken rule in French succession. John came to the throne, however, instead of the primogenitary claimant, Arthur, under Richard's designation, but mainly because the old fear of a minority was still stronger than the new principle. The nine-year-old Henry III. was made king because he was John's oldest son and the English people preferred a minority to the rule of the foreigner, Louis of France. Beginning with this succession, primogeniture prevailed in normal times; but violent misrule, with resulting usurpation and action by Parliament, might interfere with it. It had not come soon enough to interfere with the evolution of the principle that the king was under the law.

A reflection of the growth of a determinate, hereditary succession is found in the disappearance of the interregnum. Until the succession of Edward I., between the death of a king and his successor's coronation, there was no king; the king's peace was dead and confusion and lawless-service, and more a subsidy imposed at the king's will.[1] But his abuses were manifold, and this is not the place for an enumeration of the causes of Magna Carta. It is true that there was hardly an element among his people that did not have a grievance, but some were only oppressed indirectly. Those who bore the brunt of his oppression were his vassals. All the feudal abuses of William II. were repeated in aggravated form. John broke every provision which a feudal contract of his time could possibly have contained.[2] Finally, most of his vassals refused to follow him to the continent, basing their refusal on the same grounds offered in Richard's reign. The uprising which resulted in Magna Carta was not a purely feudal revolt, of which the last instance was in 1173-4. The church was here concerned, and not simply in its baronial character; and the barons had a substantial backing in the discontent of the lower classes. There was in it the hint of a national revolt.

Whence came the possibility in England of anything even approaching a national revolt at a time when such a thing was impossible elsewhere in Europe? The regular arrangement of forces in earlier conflicts had been king, church, and lower classes against feudal nobility. Throughout the middle ages, in Europe, the lay nobles stood alone; their interests could not be identified with those of any other class. While people and church saw a lesser danger in the growing power of the king than in the power of numerous local tyrants, there was no possi-

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ness sometimes resulted. Edward I.'s succession was a transition in this matter. He was on crusade when his father died; but four days later, upon his father's burial, a considerable number of prelates and barons took the oath of allegiance to him notwithstanding his absence. From that time, he was regarded as king, and was the first so regarded before coronation. With the succession of Edward II., the change was complete; he became king by the fact of his father's death.

[1] See Mitchell, *Taxation under John and Henry III.*, pp. 361-366.

[2] Yet John was not original at every point. It has been too often assumed that every abuse corrected in the Charter must have been begun by John. Extortionate reliefs on the baronies, for example, go back to Henry II.

bility of winning power from the king on the part of the nation. In England, from the Conquest to the end of the twelfth century, the feudal nobility had received such a succession of staggering blows that royalty reached at a stride a position which it took centuries longer to reach in France or Spain. Also in England large parts of the nobility had been forced by strong kings to stay at home and quit fighting and were used by the kings in all sorts of governmental work. The English knighthood was not the continental knighthood. It was a knighthood with which church and middle class might make common cause. Stephen Langton became the brains of the barons' movement.[1] When a chronicler told how the Londoners, at the critical point in the rising against John, on their own motion entered into negotiations with the barons and actually opened their gates to a feudal army, he recorded a very great event. The simple but fundamental causes of this difference in England's history were insularity, the Norman Conquest, and the remarkable post-Conquest sovereigns.

The atrocious character of John's reign was suited in every detail to rouse the opposition of every element that could make itself felt. The situation is significant beyond exaggeration, not so much in making national opposition possible at an early date, for opposition without a guiding principle would have wasted itself; but in bringing it about just early enough to use to the full feudalism's principle of contract[2] and to revive the long interrupted series of royal charters of liberties. How

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[1] The stand of the church was doubly notable, for English churchmen were not only uniting with their age-long enemies, the lay nobles, but were at the same time defying the pope, John's overlord and ruler. It is interesting that in John's reign the term "English church" (*Anglicana ecclesia*) was being used. A chronicle (*Annals of Waverley*) has it for the year 1207. See Stubbs, *Select Charters*, p. 268. And it is used twice in article 1 of Magna Carta—perhaps its first use in an official document. One cannot help wondering what of national stirrings in the church in England the rise of this term reflects.

[2] See below, pp. 270, 271. In decadent continental feudalism, the nobility retained a character which made co-operation with church or people impossible long after the contract idea had become obscured.

John would have been dealt with had Henry I.'s charter not been discovered it is hard to tell. It had been a long time since 1154, and a charter of liberties was not in mind. The barons had long felt keenly enough John's violation of feudal custom, but they had been beating about with no practical expedient in mind short of the last violent extremity of expulsion from the throne. Then Stephen Langton found the old charter, made the suggestion, and forthwith sentiment crystallised about the charter idea. The mere mention, however, of something national about the rising of 1215 tends to exaggerate that feature of it. It was mainly a feudal revolt; the suzerain had broken his contract, and his vassals proposed to compel him in some way to keep it, or else sever their relations with him and take to themselves a new overlord.

The Charter[1] of course reflects its origin. The early articles are predominantly feudal and show the use that was being made of Henry's charter. Like William II., John had abused the feudal *incidents*, and here was the correction, set forth with care and detail. But on reaching article twelve, something is found not contained in the earlier document. This article touched a major grievance, and well illustrates the principle upon which the whole document was based. Its meaning is clear when viewed in the light of the king's relations with his vassals in the matter of scutage and service abroad.

> No scutage or aid shall be imposed in our kingdom unless by common counsel of our kingdom, except for ransoming our person, for making our eldest son a knight, and for once marrying our eldest daughter; and for these there shall not be more than a reasonable aid. In like manner it shall be done concerning aids from the city of London.[2]

This is a statement of the feudal principle that no payments beyond those established in custom could be levied without the consent of the vassals. They did not mean to deny the principle of scutage or say that consent was necessary to normal commutation of *bona fide* feudal service; later dealings between king and barons make this plain. What they did mean was that John's perversions of scutage must be brought under control and that no "gracious aid," *i. e.* an aid beyond the three allowed in feudal custom, should be taken without consent. That the "common counsel" referred to was simply that which the king found in his feudal court is made certain by the detailed description, in article fourteen, of how such counsel was to be taken.[1] But in the period following the Charter, feudal ideas and practices were rapidly disappearing; taxation developed along several lines; the Charter, though, with this, among other articles, omitted, was frequently confirmed, and the contract idea running throughout it was thus kept alive—and that in a period when people were not scientific in their use of history and did not enquire what the contract covered or meant at an earlier time. The result was that, whereas in 1215, in this matter of aids and scutages, the king's vassals held him to the feudal law, at the end of the century the nobles, assuming to speak for the nation, said that the king should not levy taxes without general consent.

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[1] A. and S., document 29; W. and N., pp. 380–396.

[2] For the reason for mentioning London in this feudal connection, see Adams in *English Historical Review*, xix., 702–706.

A completer illustration is found in article sixty-one. This article sets forth the contract principle in more general terms. It says, in effect, that there were recognised customs and laws, such as those just set down, which the king was bound to keep, and that if he did not his people could compel him to keep them; and it provided the clumsy machinery of the twenty-five barons to this end. Feudalism was clearly the source of this idea. The feudal contract was the formal ground for this whole baronial movement, that which saved it from being a mere unformulated protest against oppression. The feudal character of Magna Carta, as far as the contents of the several articles is concerned, might easily be overstated; other than feudal abuses were corrected, and non-feudal classes were to some extent concerned. But a study of either the remote or immediate causes leaves one in no doubt as to where the animus of the movement lay; the initiative was taken by the barons and the bulk of the work was done by them. Magna Carta powerfully emphasised the contract between the suzerain and his tenants-in-chief, and between the tenants-in-chief and their vassals. Writers in modern times have tried to bring this famous document under some well-known category, to see in it, for example, something of a "fundamental law" or "frame of government" or statute. Whatever of these it has come to be or to symbolise in its long later history,[1] to the barons who made it, it was a declaring of those points in law, largely feudal, which were at issue between them and John; these were the substance of a contract or treaty which they forced upon the king, their side of the treaty being a tacit understanding that on this basis they would continue to regard him as overlord and king; and in putting this treaty into words they drew upon the forms of contemporary land grants.[1] The historical backgrounds, the antecedent ideas or developments which the circumstances of John's reign brought together and made into Magna Carta (and these had not been total strangers before), were the feudal contract, the habit of united action on the part of English nobles, the growth of a nobility with which church and townsmen could co-operate, and the evolution of the written formal promises or charters of the post-Conquest kings. To understand how the king's power became limited in England it is highly important to watch the further history of the charter idea.

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[1] For a discussion of the famous phrase *commune consilium*, especially as to whether or not it was an assembly name, see *American Historical Review*, xxv., 1–17.

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[1] Magna Carta in 1215 was one thing; Magna Carta in later history has been quite another. The imagery of the late Professor Dunning (*Truth in History*, American Historical Review, xix., 220) exquisitely presents this two-fold aspect: "Many a fact of history is like the grain of sand that intrudes within the shell of the pearl oyster. Tiny and insignificant it is quickly lost to sight and knowledge; but about it are deposited the ensphering layers of myth and legend till a glimmering treasure is produced that excites the mightiest passions of men. Under the charm of its beauty, art, religion, civilisation is developed; through the lust to possess it a dynasty is overthrown, an empire falls into ruin. The historian may crush the pearl and bring to light the grain of sand; but he cannot persuade us that the sand made all the intervening history." Magna Carta was not "tiny and insignificant" in 1215, but it did undergo the *sea-change*. It has long been a myth, a very powerful myth; and most people would agree that, judged by almost any interpretation of history, it has been a beneficent myth. Its story is unquestionably important, but has long been neglected. Bémont's brilliant but brief sketch in his *Chartres des Libertés Anglaises* (pp. xxvi.–lxxvi.) made a beginning; and a detailed study of the Charter in the thirteenth century has just appeared in Dr. Faith Thompson's *The First Century of Magna Carta: Why It Persisted as a Document.*

The reign of John was followed by a long minority, practically a new thing in English history. In order to get every possible backing for the new king, the Charter was reissued in great haste, but with a respiting clause which referred to the omission, among others, of the clauses just considered.[2] Changed conditions, especially the fact that the Charter was now voluntarily put forward in the name of the boy king instead of being won at the sword's point from an old incorrigible like John, and lack of time for careful consideration made it seem best to go slowly on several points. What definite change there was, was probably in the interest of the central power, but the Charter was still a compact. In 1217 came the second reissue. This reflects mature deliberation on all points, and the forest articles appeared in an enlarged form as a separate charter. Hence the regular reference thereafter to "the Charters."[1] The third reissue during Henry III.'s minority was in 1225, and it was then that the Charter took its final form. Apparently soon after, the wording of John's Charter passed out of mind, and until well into the seventeenth century Magna Carta meant the contents and phrasing of the 1225 reissue.[2] This reissue is notable also as having been granted specifically in return for a tax—a true tax, not a feudal aid—thus for the first time linking up Magna Carta with national taxation;[3] and for the inauguration of the custom of accompanying a confirmation of the Charters by a solemn pronouncement of excommunication against all who might infringe them. Henry's minority, when Louis of France was forced to leave England and John's foreign mercenary leaders were driven from their fat holdings and from the country, was a time when English national feeling was becoming a factor in events. Englishmen were proud that they were Englishmen and distinguished themselves sharply from Frenchmen. It was a time favourable to new ideas or the re-rooting of old ones.

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[1] It is a notable feature of the Charter that the barons brought forth no new scheme of government which they wished to substitute for the great creations of the Norman and Angevin kings; they were ready to accept these almost *in toto.* It may indeed be said that the English baronage by 1215 was made up of men who could largely appreciate and value the wonderful achievements in government of recent years. What they wished was not to destroy, but to control; and the same may be said of baronial conflicts with the king until the baronial opposition was lost in a movement that was truly national.

[2] The clause reads: "But because certain articles were included in the earlier charter which have seemed difficult and doubtful, that is to say concerning the assessing of scutages and aids, the debts of Jews and others, freedom of going from or returning to the realm, forests and foresters, warrens and warreners, and the customs of counties and of river banks and their guardians, it has pleased the said prelates and magnates to hold these in respite until we have further counsel, and then we shall provide most fully for these matters and others which may come up to be amended, which pertain to the common weal of all and to the peace and position of us and our realm." Latin original in Stubbs, *Select Charters*, p. 339. It was hard for the barons to formulate in words just what they desired in the matter of scutages, and now that John was removed corporate consent to aids seemed unnecessary and often inconvenient. In the reissue of 1217, the difficulty of framing a scutage clause was gotten around by simply making the king say (in article 44) "Scutage shall henceforth be taken as it was accustomed to be taken in the time of Henry II. our grandfather." This was really what the barons wished and the easiest way to indicate it. The provision about aids and corporate consent disappeared from the Charter forever. But Henry III. "never took an aid except by the consent of the great council. It is likely that this was due to the growth of corpor-

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ate feeling among the magnates, rather than to a desire to conform to article 14. However that may be, the method followed was the same as that provided in the dropped articles." Mitchell, *Taxation under John and Henry III.*, p. 367; for a discussion of this whole matter, pp. 359–369.

[1] Magna Carta first got its name "great" to contrast it with its shorter and less important offspring, the charter of the forest. See *English Historical Review*, xxx., 472–5; xxxii., 554, 555.

[2] Bémont's *Chartes des Libertés Anglaises*, with its valuable introduction and notes, serves best for a study of the various editions of the Charter. See also Stubbs, *Select Charters*, pp. 292–351, *passim.*

[3] See below, p. 417 and note 2.

The charter idea was striking deep into the soil. The elaborate provisions for preserving originals and multiplying copies of John's Charter plus these minority revisions would go far to keep royal charters of liberties from ever again being forgotten. And though the text of John's Charter passed out of mind, yet nobody forgot that a charter had been wrung from him. The striking events of his reign with this impressive and dramatic denouement had fixed the attention not only of England but of many parts of the continent.

But the time was still critical and much depended upon the character of Henry III. Had he been a strong and intelligent ruler, the contract idea might have died with the rest of feudalism. But his weakness, meanness, extravagance, and love of foreigners did the work that was necessary. England has been indeed fortunate in the distribution of her good and bad kings. There was no chance to forget the Charters in Henry III.'s reign; to make the king confirm them gave his exasperated subjects something to do that seemed rational; for many years there was a dawn of hope each time he solemnly swore to observe them. But finally men began to realise with how mean and petty an individual they were dealing. Since the Norman Conquest, with one exception, Henry was the first king who had not been feared, and it is interesting to note the increasing freedom with which his shortcomings were denounced to his face.[1] It would have been dangerous to stable government to have had such a condition last long; but something of this sort was needed to break the tremendous prestige of the Angevin monarchy. As the reign progressed, so did emphasis on the Charters. When Henry was declared of age in

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[1] The chronicler Matthew Paris reports (1244) that "the magnates of England convening on Nov. 2, when the king most insistently, not to say most impudently, asked them again for a money aid, so many times injured and deluded they with one voice refused him to his face." (Stubbs, *Select Charters*, p. 327.) See also the very lively dialogue between the king and the Prior of the Hospitallers cited in Taswell-Langmead, *English Constitutional History*, p. 294.

1227, there was great fear shown throughout the country lest he might attempt some act of repudiation, and in that year the administration of certain articles became the subject of critical dissensions between people and sheriffs;[1] in 1237 a notable confirming charter was issued in exchange for a tax, again the solemn ceremony of excommunication, with the king crying out dramatically, *Fiat, fiat—amen, amen*, and the great Edmund Rich continuing the *English* tradition in the church; in 1242, in connection with refusal of a tax, and in an assembly notable for the maturity of its political thought, references to the acts of 1237 and how poorly the king had kept his agreement[2]; in 1244 the well-known great council that was minded to appoint ministers, the king repeatedly referring to the Charters and promising to keep them better, and articles agreed upon which were in the nature of a supplement to Magna Carta—the first such; in 1253 a most notable instance of the ceremony of excommunication and anathema against infringers of the Charters, with the king participating and the pomp and terror of the church at their height and the Charters referred to in words that stamp them as fundamental and unchangeable by any earthly power—followed by the king's attempt to gain from the pope a release from his oaths; in 1254 the papal support of the Charters made clear, and measures taken in some of the bishoprics for renewed publicity—reading in county and hundred courts and wherever people gathered and in both English and French translations; and in 1258, the crisis of the reign reached, confirmation of the Charters was demanded in the Provisions of Oxford Parliament. There followed the rise of Simon de Montfort, the civil war, and the last seven peaceful years, when the results of the conflict appeared in the administration of Prince Edward. The rising of 1258 was, in essential features, like that of 1215, a barons' affair. Its immediate result was the attempted form of government outlined in the Provisions of Oxford.[1] Here was a repetition of the device, originated in article sixty-one of the Charter, to put the government into the hands of an aristocratic group, but with much elaboration of detail. It is no matter of regret that the experiment failed, for an aristocracy, once established, would have been more difficult to deal with than the king. But the Provisions of Oxford served to continue and emphasise the idea that, under sufficient provocation, the king might be deprived of his power.

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[1] See below, pp. 360–362.

[2] Matthew Paris's account of the discussions in this council is highly interesting. See Stubbs, *Select Charters*, pp. 360–362. Whatever this and the assembly of 1244 may have been formally standing for, there was an atmosphere of nationality and maturity in them, if the chronicler reported them aright, which foreshadowed a new era.

In the spring of 1265, shortly before the tide turned against the triumphant Simon, Henry III. confirmed the peace made the preceding year and at the same time the Charters. Perhaps the most striking clause in the famous sixty-first article of the Great Charter was that in which John was made to admonish his people to rise against him, in case he broke the law, and by the use of force bring him again to the lawful way. This was repeated with great distinctness in this confirmation by Henry III. After premising unlawful acts of the king or Prince Edward, the language concludes:

> . . . it shall be lawful for every one in our realm to rise against us and to use all the ways and means they can to hinder us; to which we will that each and every one shall henceforth be bound by our command, notwithstanding the fealty and homage which he has sworn to us; so that they shall in no way give attention to us, but that they shall do everything which aims at our injury and shall in no way be bound to us, until that in which we have transgressed and offenced shall have been by a fitting satisfaction brought again into due state, according to the form of the ordinance of the aforesaid, and of our provision or oath; this having done let them be obedient to us as they were before. . . .[2]

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[1] A. and S., document 34.

[2] *Ibid.*, document 36.

Such a legalising of rebellion was full of possibilities; it leads one to question what would happen if a king refused to be thus limited and so repeatedly broke his laws and agreements that there was no possibility of his people's again being obedient as they were before. The answer is undoubtedly found in what the barons had attempted to do with the incorrigible John.

Sometime between 1235 and 1259, Bracton wrote his great work, *De Legibus et Consuetudinibus Angliæ.*[1] In the first book, in treating of the "dignities" of various persons and classes, he set forth the dignity of a king in words which reflected the history of his time. They are worthy of remembrance as the first formulation of a great principle and for their precision and force:

> For the king ought not to be under man but under God and under the law, because the law makes the king. Let the king therefore bestow upon the law what the law bestows upon him, namely dominion and power, for there is no king where will rules and not law.[2]

When one reflects that this was written only a half-century after Richard's reign, some conception is gained of what the first half of the thirteenth century meant in

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[1] See above, pp. 228, 229.

[2] "Ipse autem rex, non debet esse sub homine, sed sub Deo et sub lege, quia lex facit regem. Attribuat igitur rex legi, quod lex attribuit ei, videlicet dominationem et potestatem, non est enim rex, ubi dominatur voluntas et non lex."—Bracton, *De Legibus* (edited by Twiss in the Rolls Series), i., 38. At that time there was no incompatibility in the thought of a king below the law and yet not below a man or any body of men. The source or abode of law was not defined. Law was independent of man, even of God. Also there was no clear notion as to whether the church was below the state or vice versa; there was no conception of an ultimate abode of sovereignty. Before the Reformation, which was at bottom a searching enquiry into authority, Austin's doctrine of sovereignty was impossible. An annotation of Bracton's text, probably during the revolt of 1264–5, carried the idea of limitation much further: "The king has a superior, that is God; also the law by which he has been made king. Also his court, that is to say earls and barons, because earls [*comites*] are called associates of the king, and he who has a fellow has a master; and therefore if the king be without restraint, that is without law, they ought to put restraint upon him." See discussion in Maitland, *C. H. E.*, pp. 101–103.

English history.[1] That this principle—the king is under the law—was enshrined in Bracton's authoritative law book for men of later generations to ponder and quote was undoubtedly a great force making for limited monarchy. It put the law forever on that side.

Henry's surrender of the administration, during the last seven years of his reign, to the able and law-respecting Edward was in itself a confirmation of these attempts to bring him under law. The bad reigns of John and Henry had done a great work; for three quarters of a century, the idea of compelling a contumacious king to keep the law had been driven again and again into men's minds. Perhaps it cannot be said that there was limited monarchy. The men who had felt the situation most keenly were the barons, those who had always been in contractual relations with their suzerain. Class feeling had not changed to national feeling in 1272.

In the reign of Edward I., many things contributed to the passing of feudalism. Little can be done here but name some of the more important. Before his accession, Edward seems to have had in mind some direct limitation of private jurisdiction, for almost immediately upon his arrival in England he sent commissioners throughout the country to enquire into the nature and extent of the franchises. Their report was embodied in the "Hundred Rolls," which contain much valuable information about local government. This enquiry resulted in the Statute of Gloucester, 1278, whose main purpose was to limit and regulate the private courts. The assumption seems to have been made—perhaps not seriously even at first—that every holder of important franchises must produce some written royal warrant for them or else surrender them. At any rate, itinerant justices, armed with the Writ Quo Warranto, were sent to investigate each case. It was soon found impossible, without causing a barons' rebellion, to carry out such a procedure in a thorough fashion. Notwithstanding the dictum of Bracton that no prescription held against the king, those who could prove an uninterrupted exercise of their rights back to the coronation of Richard I. (the limit of legal memory) were allowed to keep them. But the great thing that was accomplished was the establishment of a definite policy of the crown to make no further grants of judicial powers or immunities. As the franchises were always liable to escheat to the crown through failure of heirs or forfeiture, under the policy inaugurated by Edward the jurisdictional side of feudalism was bound eventually to disappear.[1]

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[1] In France, till the reign of Philip Augustus, the power of the kings had been far behind that of the post-Conquest kings of England; but at the very time that Bracton was writing, the principle was being enunciated there that the will of the king is the highest law. Up to this point and even afterwards, the French and English governments were in many respects alike, but the parting of the ways had been reached and the divergence was rapid.

Edward's land legislation had the same animus. The Statute of Mortmain,[2] while not a direct blow to feudalism, was calculated to strengthen the state by stopping a kind of land alienation that was depriving the state of its proper resources. The Statutes De Donis Conditionalibus and Quia Emptores, especially the latter, caused decided modifications of the normal feudal results following alienation of land. De Donis made possible a strict entail of estates which greatly increased the chances of escheat to the original grantor or his heirs, while Quia Emptores prevented subinfeudation, a process essential to live feudalism.[3] Edward had the great lords on his side, for the more land and vassals a lord had the more would be his benefit from these measures, and the king himself as the greatest landholder and suzerain would profit most of all. If the principle of Quia Emptores were to be rigidly enforced, then, through the natural operation of escheat, all freemen would finally come to be tenants-in-chief of the king—or rather his subjects, for then all proper meaning of tenancy-in-chief would have passed away.

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[1] "Speaking roughly we may say that there is one century (1066–1166) in which the military tenures are really military, though as yet there is little law about them; that there is another century (1166–1266) during which these tenures still supply an army though chiefly by supplying its pay; and that when Edward I. is on the throne the military organisation which we call feudal has already broken down and will no longer provide either soldiers or money save in very inadequate amounts."—P. and M., i., 252, 253.

[2] A. and S., document 40.

[3] *Ibid.*, documents 42 and 45. Quia Emptores confirmed the usual practice of the king's courts in the thirteenth century of allowing free alienation (*i.e.*, without the overlord's consent) to all but the king's tenants-in-chief; but by stopping subinfeudation the purchaser held, not of the seller, but of the seller's overlord. If possible these acts of Edward I. should here be studied from the documents, with the help of one of the short histories of English law.

The great conflict of 1297, although led by two earls and outwardly as much an affair of the nobility as the risings of 1215 and 1258, was clearly less feudal. The king was attempting to lead into the foreign service not only his feudal levy, but every one in the country whose lands furnished a yearly income of £20 or over; and his taxation (there is now no hesitation in calling it such) affected all classes.[1] Thus the resistance, however prominent a part in it was played by the nobility, was not a resistance to feudal abuses primarily; it was not merely to hold the king to his feudal contract, but to limit a sovereign's unlawful assumption of power. Of course in the thought of the moment, the baronage and the prelates were acting on selfish motives while putting themselves forward as champions of the nation; but such had been the changes in society and such the development of taxation that when they were standing for themselves they were standing for the nation and must recognise the fact. The change from class feeling to national feeling was coming—"the most important and least understood thing in English history."[2] The men of 1297 did not understand the change, and believed that the difficulty lay in the fact that the Charters had not been properly enforced. Over seventy years had passed since the wording of the Charters had been changed.[3] While there is no doubt that during that long time their prestige had grown rapidly, their wording acquiring a kind of prescriptive immutability, and Magna Carta especially was beginning to be a symbol of the law's supremacy, yet it is also true that to the end of the thirteenth century at least, they were very practical documents whose articles were not so out of date but that they were the subject of detailed controversy with the king or his officials and of frequent administration in the courts.[1]

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[1] See below, pp. 407–409.

[2] McIlwain, *High Court of Parliament*, p. 16.

[3] The difficulty of an unchanging and finally unchangeable text, was at times gotten around by a kind of supplement at the time of confirmation, sometimes incorporated in the confirming order. Something of the sort

The protest which was drawn up in July, 1297, under the leadership of the Marshall and Constable, earls of Norfolk and Hereford respectively, purported to be in behalf of archbishops, bishops, abbots, priors, earls, and the whole community of the land (*tota terre communitas*); in its articles prominence was given to the word *communitas;* and in article four there is mention of the omission or neglect of the articles of Magna Carta, the king being besought to correct this abuse.[2] The great enactment, *Confirmatio Cartarum*,[3] sealed by the king in November, will be considered in connection with the origin of Parliament.[4] It is enough to note here that in it was laid down the principle of no taxation without the consent of the taxed. It was not a restoration of the long omitted article twelve of Magna Carta; but the principle there declared that the suzerain could not arbitrarily levy exactions upon his vassals was here replaced by a national principle determining the relation of sovereign to subjects.

There was an unhappy sequel to this seemingly grand conclusion of the struggle of Edward's reign. The barons

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has been noticed earlier (1244 and 1265); but the most important instance was the inclusion of the great clauses on taxation in the confirming order of 1297. In 1301, the "Articles upon the Charters" (*Articuli super Cartas*), a document of twenty articles of which the first was the confirming order, was a vigorous and detailed statement of contemporary abuses and points of controversy. See summary headings of these articles in *Statutes of the Realm*, i., 136–141.

[1] This has just been shown in convincing detail in Dr. Faith Thompson's *The First Century of Magna Carta.*

[2] Bémont, *Chartes des Libertés Anglaises*, pp. 76–78.

[3] A. and S., pp. 86–88.

[4] See below, pp. 407–409.

seem never quite to have believed that Edward fully and with no mental reservations granted what Confirmatio stated. Edward, on his part, was piqued and hurt at this lack of confidence, and probably used, in dodging the spirit of the Charter, much of that "legal captiousness" with which Stubbs has credited him. The last decade of his reign was a period of intense charter consciousness and controversy; bitterness and recrimination mounted, until Edward in obtaining from Pope Clement V., in 1305, a release from the oaths taken in 1297, confirmed the barons' suspicions. Bémont has well stated the situation:

> . . . at the Parliament of Lincoln (January, 1301), the first article of the petition addressed to the king was "that the two charters of liberty and of the forest be entirely observed in all their articles from this time forward." This precedent was fortunate: henceforth, and during the entire fourteenth century at least, most of the Parliaments began thus and the express consent of the king (*Placet; il plet au roy*) was carefully entered upon the rolls.[1] The precaution was not unnecessary: this is seen when Edward, finally at peace with France and Scotland, asked and obtained from Pope Clement V. absolution from all his oaths and the annulling of the charters (1305, 29 Dec. . . .). The best king of the thirteenth century had done then as the worst; like John Lackland, Edward I. had avowed that he had granted the Great Charter "voluntarily and spontaneously"; at heart neither the one nor the other ever believed that he had abdicated the least particle of his authority. This unfortunate

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[1] Bémont cites Sir Edward Coke's reckoning that Magna Carta was confirmed "15 times under Edward III., 8 times under Richard II., 6 times under Henry IV., once under Henry V.; and that, to sum up, the Great Charter and that of the forest have been expressly established, confirmed, or promulgated by 32 acts of Parliament." He adds: "These figures can be taken as exact; they show the value that the nation attached to these repeated confirmations; but also of what little importance the king made them." Translated from *Chartes des Libertés Anglaises*, pp. xlix., l. Yet whatever the king thought or did, as often as he confirmed the Charters, so often did he in effect assent to Bracton's dictum that the king was under the law. Throughout the fourteenth and fifteenth centuries the Charters were included at the beginning of the many manuscript collections of statutes which were being compiled and circulated.

attitude lasted as long as the old order of kingship, that is to say to the end of the seventeenth century.[1]

One may hesitate to judge quite so harshly a king who gave so many examples of fidelity to trust, and Edward and his successors surely recognised some abiding supremacy of law symbolised in the Charters, but there is here a valuable caution against attributing to these kings the conscious and willing constitutionality of recent times.

In passing from a reign in which the vigor and wisdom of the king were so great and in which there were not a few public men of distinction into the miserable reign following, the first feeling is one of loss and misfortune; and in looking forward through the whole list of kings between Edward I. and the first Tudor, one is conscious of a distinct stepping down from earlier royal standards of thought and achievement. But with reference to the establishment of limited monarchy, it was not an unmixed evil that Edward I. was not followed by kings as great as himself. With Parliament not yet effective, it is to be doubted whether the principle of resisting a king who broke the law had become so fixed in the people that it could not have been uprooted. It was a long time, however, before there was an opportunity to forget the principle or before there was a king able to defy it with much chance of success. In Edward II.'s time, public men were mediocre or worse; yet governmental institutions grew in a natural and healthy way—indeed it was a time of notable development in certain departments.[2] Growth was not disturbed by violent impulsions or repressions. It was only the third year of the reign when the king's inability and wrongheadedness resulted in the third experiment of putting the government into the hands of a commission of nobles. The commission was known in this instance as the Lords Ordainers. The Ordainers forthwith decreed that the Charters be observed, issued orders against the most pressing grievances, and then proceeded to draw up a document of forty-one articles which was presented to the king and was put in force in 1311. These articles were called the New Ordinances to distinguish them from certain preliminary ordinances of the year before.[1] They dealt with the problems and abuses of the time, several of which lasted over from the preceding reign. Administration of justice, conduct of officials, appointment of the great officers of state with the counsel and consent of the baronage and with the ceremony of being sworn in Parliament, management of the royal property, forbidding the king to go to war or quit the realm without the barons' consent in Parliament, annual Parliaments, the declaring of Edward I.'s customs duties illegal and contrary to Magna Carta—these were the matters of chief importance. The act which repealed the New Ordinances in 1322, when Edward was under control of the Despensers, had a significant clause defining the competence of Parliament.[2]

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[1] *Chartes des Libertés Anglaises*, pp. xlvii., xlviii. [2] See below, pp. 321–323.

But the great fact looking towards limited monarchy in Edward II.'s reign was his deposition. It might seem that such an event would have been almost its attainment and final guarantee; but it is necessary, in weighing the value of what occurred, to consider carefully the cause. Edward was not deposed because he had made a deliberate attack upon the constitution; he had not the bent of mind or force of will. He was deposed because he was lazy and incompetent, one whose qualifications, such as they were, fitted him for anything but kingship, one whose birth was his misfortune. The articles of accusation,[3] which have a deeply tragic interest, say, among other things, that

> throughout his reign he has not been willing to listen to good counsel nor to adopt it nor to give himself to the good government of his realm, but he has always given himself up to unseemly works and occupations, neglecting to satisfy the needs of his realm.

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[1] A. and S., document 51. [2] *Ibid.*, p. 97. See below, pp. 399, 400, 413, 414.

[3] A. and S., document 55.

In the fourteenth century, the machinery of government could not run itself and allow the king to be a figurehead. Medieval kings, good and bad, were laborious; their government was personal in a way hard for moderns to understand. A king who would not work was an impossible king. This is not quite the whole story about Edward II.; he did some positive things that aroused enmity, and his reign would have dragged on longer had it not been for his wife and Mortimer. But the chief trouble was that the country was drifting into misrule through lack of governance, and it was felt that a change was absolutely necessary. The method used was awkward and looks a good deal like revolution: writs to summon a Parliament to depose him were issued in the king's name and he was made to sign a formal abdication. Parliament clearly thought it had full power to depose a worthless king, but was troubled to find legal machinery. But whatever the cause or the method, there was a deposition, and, in an uncritical age, it would be sure to serve powerfully as a precedent.

In the discussion of Parliament's growth of power, it will appear how, throughout Edward III.'s reign, the arbitrary action of the king was limited by his dependence upon the country for the great sums of money needed for the war with France.[1] A king so placed could never have refused to confirm the Charters even had he wished to. A notable confirmation in 1368 declared that

> at the parliament of our lord the king . . . it is assented and accorded, that the Great Charter and the Charter of the Forest be holden and kept in all points; and if any statute be made to the contrary, that shall be holden for none.[2]

This making the Charters a specially inviolable portion of the fundamental common law was continuing and confirming a way of regarding them that had begun by the middle of the thirteenth century.[1] As with the passing of time the articles drawn in 1217 and 1225 became really less applicable to the affairs of life, the venerable documents were nevertheless not a lesser but a greater force: through what they stood for as a unit, as a symbol, through having certain susceptible articles of the Great Charter (the wording of some made this extremely easy; "the expansible nature of the Charter" is marked) stretched and misconstrued to fit new conditions, by having new articles associated with them at the time of some of the confirmations, and by being vaguely connected with certain statutes which dealt with some of the more general principles of public law.[2]

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[1] See below, pp. 400, 410, 419.

[2] This clause was referred to several times in the debates on the Petition of Right in 1628.

The constitutional significance of Richard II.'s reign lay largely in his deposition, a deposition more important than that of Edward II. Leading up to it are some matters of interest. Richard early showed himself extravagant, improvident, and addicted to favourites. The Parliament of 1386 proposed to impeach his Chancellor and appoint a commission of reform. The king's reply showed his lofty conception of the royal prerogative. Then the fate of Edward II. was recalled, and the king was reminded of it in words that show clearly the use that was being made of the early precedent.[3] The king yielded, the Chancellor, the Earl of Suffolk, was impeached,[4] and a commission of reform, consisting of eleven members, was appointed. It was given broad powers and was to continue for one year. It can not be considered a commission of regency, for Richard was nineteen years old and Parliament's act was the result of his misgovernment rather than of his incapacity. It was a late instance of the device, used with John, Henry III., and Edward II., of placing the government in time of crisis under the control of an aristocratic group, and also shows how Parliament might be exploited by baronial factions at this time. Its use so late proves the tenacity of life of the old baronial opposition and also how slowly the possibilities of parliamentary government were realized. But there can also be seen in it some attempt by Parliament to control a governing group within the Council; that it was created by, and in some sort held responsible to, Parliament rather diminished its oligarchic character.

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[1] See above, p. 275.

[2] There was later reference, especially in the seventeenth century, to a mysterious "six statutes" which, with Magna Carta at their head, appear to have been thought of as a specially honourable company—a sort of basic, inviolate core.

[3] A. and S., document 94.

[4] *Ibid.*, document 93.

A few months after the dissolution of the 1386 Parliament, Richard summoned the judges of his central courts and presented to them a set of questions bearing upon the legality of the recent acts of Parliament. The judges, through natural subservience or fear, answered unanimously in the king's favour.[1] Mindful of the origin of the royal courts, it is easy to understand that the judges, created by the king, felt closely identified with his interests. But now new conditions were arising. It is too early to talk of the executive using the judiciary in a quarrel with the legislature, but there was at least a hint of this. Control of the judges was one of the most important and one of the latest parts of the royal prerogative to be surrendered.

In 1389, Richard declared himself of age. The last two periods of his reign, that of orderly government from 1389 to 1397 and that of attempted absolutism from 1397 to 1399, have long been a puzzle. The absolutist tendencies at the beginning and end of his reign lead one to think of the middle period as a long dissimulation, while the extravagance of his later claims and the freakishness with which he let slip the substance of power suggest madness. Mad or sane, however, his measures in the Shrewsbury Parliament[2] to secure his own unlimited authority were a methodical attack upon the restraints which Parliament had already placed upon the sovereign. In his deposition, therefore, among the various motives which actuated it, there was distinctly the purpose to preserve the laws and customs of the realm. An attack had been made upon them, the case of Edward II. was in mind, Richard II. was rejected, and a king who would rule under the law was put in his place. Richard was made to declare himself "wholly insufficient and useless," and the act of Parliament which confirmed his deposition was based upon his "crimes and shortcomings," his "very many perjuries" and the "default of governance and undoing of the good laws."[1] As with Edward II., the deposition of Richard II. lacked satisfactory legal procedure. His act of abdication was under duresse and he was then deposed by a Parliament which he had been forced to summon. He might at a future time plead constraint against his abdication, likewise against the legality of this Parliament and its act. "This is perhaps the reason why very soon afterwards Richard disappeared from the world."[2]

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[1] For further detail, see Taswell-Langmead, *English Constitutional History*, pp. 272, 273.

[2] A. and S., documents 100, 101.

When Edward II. was deposed, he was succeeded by his son; Richard II. was succeeded by his cousin, who, if a woman could transmit the title, had no primogenitary claim. In private law it had become established that the line claiming through the elder son had the greater right even though the claim had descended through a woman. If this applied to title to the crown, then Henry of Lancaster had no good claim as long as there was a male descendant of his uncle Lionel Duke of Clarence, albeit that descent was solely through Lionel's daughter. There is no doubt that Henry felt this and said as little as possible about hereditary descent.[3] He was king by conquest and by consent of Parliament, and the assumption on the part of Parliament in this instance, that it not only could depose a king but break the order of succession seemed a very important advance in its control of monarchy. This special dependence upon Parliament fixed the character of Henry IV.'s reign.[1] It did much to fix the character of all three Lancastrian reigns. Sir John Fortescue, who was chief justice of the King's Bench under Henry VI. and whose famous writings distinctly foreshadow the interest in political theory of a later time, set forth a conception of kingship current in the Lancastrian period:

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[1] Documents 102–104 in A. and S. illustrate the deposition of Richard II.

[2] Maitland, *C. H. E.*, p. 192.

[3] The foolish claim which may have been hinted at in the words, "as I that am descended by right line of blood coming from the good lord king Henry III." (A. and S., p. 164), which were used by Henry when he made his oral challenge of the crown, had no foundation in fact and probably gained little credence at the time. See Oman, *History of England* (1377–1485), p. 153.

> A king of England cannot, at his pleasure, make any alterations in the laws of the land. . . . He is appointed to protect his subjects in their lives, properties, and laws; for this very end and purpose he has the delegation of power from the people, and he has no just claim to any other power but this.

And Fortescue felt keenly the difference which existed between England and France in this regard:

> There be two kinds of kingdoms. . . . And they differ in that the first king may rule his people by such laws as he makes himself, and therefore he may set upon them *tails* and other impositions, such as he himself will, without their assent. The second king may not rule his people by other laws than such as they assent unto. And therefore he may set upon them no impositions without their own assent.[2]

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[1] "He kept the throne only because he proved a statesman of sufficient ability to conciliate a majority of his subjects. He had to perform miracles of tact, energy, and discretion, in order to keep that sufficient majority of the nation at his back. He succeeded in the task and ultimately won through all his troubles to a period of comparative safety and tranquillity. It was a weary and often a humiliating game, for Henry had to coax and wheedle his parliaments where a monarch with a strictly legitimate title would have stood upon his dignity and appealed to his divine right to govern." Oman, *History of England* (1377–1485), p. 154. In a later connection (see below, pp. 434, 435), there will be occasion to note the relations of Parliament and Council to the king and to each other in this reign.

[2] Cited in Taswell-Langmead, *English Constitutional History*, pp. 288, 289, and Maitland, *C. H. E.*, p. 198.

In several respects conditions were exceptional in the Lancastrian period, conditions reflected in such writings as Fortescue's, but it is not too much to say that the lines of development just sketched had brought forth limited monarchy in England.

The bitter faction fights which led to the Wars of the Roses, bringing out the rival claims to the throne of Lancaster and York, did much to develop and clarify ideas about primogenitary succession, especially the matter of female transmission of title. "When in 1460 the Duke of York laid his pedigree before the lords with a formal demand for the crown, legitimism makes its first appearance in English history."[1] The principle of heredity which had long obtained in private law now became the rule for the royal title, and on this basis the Yorkist line came to the throne in 1461.[2] They were legitimists and were recognised as such,[3] and there was, as might be expected, a greater manifestation of independence and security. Yet the Yorkist sovereigns did not act as if they were without limitation, however much the logic of their position might have countenanced such action. How things would have gone had they remained on the throne it is hard to say. As it was, their short and troubled tenure did not break the principle of limited monarchy, and it is certain that civil wars and weak or bad kings had, by 1485, so hurt the central power that England's greatest need was a strong and able royal line. The overthrow of Richard III. and the succession of Henry of Richmond as a distinctly parliamentary sovereign, with a most slender hereditary title and to the prejudice of many more legitimate claimants, would seem likely to result in an extreme and, under the circumstances, dangerous limitation. That this was not the case was due to the extraordinary ability and tact of the Tudors.[1]

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[1] Maitland, *C. H. E.*, p. 194.

[2] Under stress of circumstance in 1328, when recognition of female transmission would have brought the English Edward to her throne, France took the opposite view, and transmission of the royal title through the male line only was the rule as long as monarchy lasted.

[3] The language of the parliamentary recognition of the Duke of York as heir to the throne and of the act validating the acts of the Lancastrian sovereigns brings out clearly the legitimacy of their claim. A. and S., documents 128, 129.

Under the Tudors and the Stuarts, especially the latter, the royal *prerogative* was a subject of much controversy, and the constitutionalists of the Stuart period often cited Lancastrian precedents and even harked back to the royal limitations, real or supposed, of Edward I.'s time. What was, then, the royal prerogative of the later middle ages? Substantially what Prothero has described it as being in the sixteenth century:

> The prerogative of the crown consists in the peculiar rights, immunities, and powers enjoyed by the sovereign alone, including the precedence of all persons in the realm. These privileges rest partly on statute, partly on custom and precedent. But they are not vague and indefinite: they are known and capable of description.[2] They do not amount to an emancipation from law; on the contrary, they are limited by it. This is the view of Bracton; . . . But these recognized and definite powers do not exhaust the rights of the crown, because circumstances may occur which are provided for neither by law nor custom. . . . Thus beyond the definite

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[1] "The thing which was peculiar to England and decisive in its constitutional history was not the creation of Parliament nor the invention of the representative system, however important and interesting some peculiarities of detail may be in both particulars. The peculiar and determining fact was that Parliament, at the moment when it came into existence as a distinct institution, found ready to its hands, as a result of a line of development independent of its own, a traditional policy of opposition and of the control of the sovereign, based upon definite principles and rights."—Adams, in *American Historical Review*, v., 655, 656. Each scholar is likely to find the distinctive feature along the line of his own research—Maitland found it in the Inns of Court and the Year Books—but surely we are not in much danger of overstating the distinction or importance of England's conception of monarchy as worked out in the middle ages.

[2] For example, to summon, prorogue, or dissolve Parliament; to create peers and practically to name the bishops; to make boroughs parliamentary boroughs; to veto bills; to make ordinances and exercise the dispensing and suspending powers (on these various rights relating to Parliament see above and below, pp. 130, note 1, 343–4, 394, 418–21, 427); immunity from being sued or prosecuted; chief command of army and navy; to appoint or dismiss justices and almost all other officials, high or low.

prerogative and outside the area occupied by the law, there is, and must be, a vague and undefined power to act for the good of the State. . . . On this lawless province, law and custom gradually encroach, either in the interest of the sovereign or of the subject, . . . The less advanced the State, or, in other words, the less complete the control of law and custom, the larger will be the area over which the sovereign is free to act. It was still very large in the days of the Tudors.[1]

There was little attempt to define the royal prerogative in the fourteenth and fifteenth centuries.[2] There was clearly a recognition of those definite functions and rights of the crown which constitute the prerogative in the first sense; and there are indications that most of the sovereigns ascribed to themselves extensive powers beyond and were not so much impressed by the limitations implied in confirmations of the Charters and similar acts as were the people.[3] When it has been shown what power Parliament had gained by the end of the fifteenth century, a collision between crown and House of Commons in the "lawless province" will seem quite inevitable. Interest in the theory of sovereignty and authority in general was rising steadily in the fourteenth and fifteenth centuries; the conditions in Christendom—Babylonian Captivity, Great Schism, Ecumenical Councils—forced it. Then came the Protestant Revolution with its infinite curiosity about all sorts of sovereignty, its deadly blow to *ex cathedra* authority, and a religious passion injected into political thought. The conflict was near and men began to concern themselves with "forming clear notions of authority and defining its abode."[4]

[1] Prothero, *Statutes and Constitutional Documents*, pp. cxxii.–cxxiv. *passim.*

[2] However, the great Statute of Treasons of 1352, with the further but passing definitions of 1397 and 1414, and the beginning of "constructive treasons" through free interpretation of the statute, looked in that direction.

[3] See above, pp. 282, 283.

[4] Cowell, in his famous *Interpreter*, misquoted Bracton where he cited him as saying that the king "is above the law by his absolute power."—Prothero, *Statutes and Constitutional Documents*, p. 409, and above, p. 277 and note 2.

2. **The Council.**—In his work of general administration the king always acted with or through some body of men, who counselled him with varying degrees of influence. Before the end of the middle ages, there existed a very definable Council which had its traditions, whose members took a prescribed counsellor's oath, and which exercised important and distinctive functions. The Council did not become an administrative department: it was the king's advisory body with respect to all phases of government; it retained judicial and legislative features derived from the undifferentiated competence of the royal court. But with the development of the courts of law and of Parliament, the work of the Council was more and more in the administrative field, though until the fifteenth century at least, the measures upon which it determined were carried into execution through the more specialised organs of administration.[1] From a very early time after the Conquest there is evidence of a rather hazily recognised group of king's counsellors. It has already been pointed out that, with the swift growth of central business, the king's court was not only his more or less regularly summoned feudal council, but that also it was the men who remained behind after the short meetings were over, those whose business was more and more the business of government.[2] Henry I. at the beginning of his reign in the letter recalling Anselm says that he entrusts himself and the people of all England to Anselm's counsel "and to the counsel of those who

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Prothero comments upon Cowell's account of the prerogative: "Cowell describes the prerogative as 'that especial power, pre-eminence, or privilege that the king hath *above* the ordinary course of the common law,' and this was the watchword of the royalists. It required only an alteration of one word to enable Blackstone to adopt Cowell's definition, but in substituting the phrase, '*out of* the ordinary course of the common law,' for that which Cowell uses, he substituted a constitutional doctrine for one destructive of the constitution. The whole quarrel between the Stuarts and their Parliaments lies there."—*Statutes and Constitutional Documents*, p. cxxv.

[1] See below, Part III., § II., 3. In the Tudor period, king and Council acted directly; the Council was not a mere advisory group whose measures were executed by other bodies. And there was much looking towards this in the fifteenth century.

[2] See above, pp. 118, 119.

ought along with you to counsel me"—[1] language that is bound to suggest that the king had a group in mind whose function was counselling, and that probably a group more restricted than the whole body of vassals who owed him counsel. What determined who these were, who should remain behind when the summoned meeting was at an end? The officials remained and some others, but there are no distinctive marks by which it can be told just who the others were. The king's will, their own will and convenience, the business on hand, the part of the country where the king happened to be—such things as these probably determined. It was a group very subject to change. The chronicles of Henry II.'s reign are full of references to the household of the king, evidently the official household in most instances. It seems to have been most actively engaged in public business; it traveled with the king; in it were the household officers already on their way to becoming state officials; from its membership he appointed the five who became "the bench," the beginning of the Court of Common Pleas.[2] Whether this household was the core of the counselling group or the whole body it is hard to tell from the language used, but it certainly did much work. Perhaps all that can be generalised for the period down to the death of John is that the officials were in practically continuous discharge of their duties; that the king had with them at frequent intervals, if not in permanent session, others who for the time were regarded as his counsellors; that this body was becoming less feudal both in make-up and business; and that in it were already beginning to appear groups with more specialised functions—gradual and unconscious differentiations such as itinerant justices or Exchequer, or conscious creations like "the bench."

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[1] Stubbs, *Select Charters*, p. 120.

[2] A chronicle states, "by the advice of the wise men of his realm he chose five, two clerks and three laymen, and they were all of his private household" (*de privata familia sua*). Stubbs, *Select Charters*, p. 155. The rather frequent use of this term "private household" in this reign, in cases where it evidently does not mean the royal family, may indicate the presence of an inner, more confidential group of advisers.

During the minority of Henry III. the group of counsellors was especially active; it was practically a regency. Most of the royal letters were issued with its authorisation and it was regularly referred to as the council or the king's council. It is clear, as was natural under the circumstances, that there was a more vivid conception of the counselling group at this time than before. This has led some writers to assign the origin of the Council to this period. There certainly was a hastening of a natural evolution, but the counsellors did not then acquire their more technical distinguishing characteristics. Their work during the early thirteenth century was very extensive and very hard to define, for it rested on no theory other than the king's plenary power and would have no theoretical limitations. They shared the king's diplomatic work, advising him upon peace and war, and in his dealings with rebellious subjects. He might at any time consult them about routine administrative work; many of the public and private orders that he issued bear evidence that he had done so. They were quite regularly concerned with forest matters, the surveys being carried out under their oversight; also with church matters, the filling of vacancies and points upon which royal and ecclesiastical interests clashed; and with the government of Ireland, Poitou, and Gascony. During the minority, the counsellors had much to do with straightening out the Exchequer, which had broken down late in John's reign; and since regulating taxation was one of their special duties and many financial obligations to the crown were then in an uncertain state, they sat as a sort of board of equalisation. Their judicial province was large, but of a distinctly supervisory character. They sent mandates to the courts telling them what to do under exceptional circumstances, as when Innocent III.'s bull interfered with the ordeal; they told into what courts unusual cases should go, and judges often asked them for instruction upon points of law; they were a court of first instance for many cases touching barons, sheriffs, or judges; they were often appealed to by litigants who claimed that the judges had been unjust or the law wrongly construed.

But there could not be a Council, in the later sense, until there was some approach to a distinctive and continuous membership. This was quite sure to come owing to the increase of executive business and to the maturing and defining influences with which time touches all undeveloped institutions which are free from active causes of decay. The long contest of Henry III.'s reign, which began as soon as the minority ended, centred much in the Council. Henry favoured foreigners—some of them it is true very able men—or officials who had risen to power distinctly through his service and favour. He was opposed by the baronial group, standing for its old powers and privileges and seeking to express itself either in the summoned meeting of barons now beginning to be called a parliament or in the more permanent group of royal advisers, the Council. This struggle was bound in time to bring out clearer notions of the Council's make-up and powers, and the results began to show before the reign ended. In the twelve-thirties there is mention of a counsellor's oath and of an appointed and sworn council group, and in 1257, just at the crisis of the reign, appeared the first council-oath form which has come down to us, the form which was to be the basis of all later ones. From the beginning of Edward I.'s reign the swearing of councillors became the rule. This does not mean that from that time there was such a clear-cut membership, that everyone who may be called a royal councillor took the oath, but the oath development "was the means of suggesting a permanent membership and of making clear the duties of a councillor."[1]

The reigns of the three Edwards make a fairly well-defined period in the Council's history. The Council was the centre and nucleus of early Parliaments, and it was during this time that separation and distinction began.[1] We read much in the early fourteenth century of the barons' hostility to "evil counsellors," and investigation shows that in the barons' vernacular "evil" often meant low-born, that is, low-born in comparison with their own status. They were not controlling the Council as they wished. This raises the question whether the use of these more humble counsellors, knights many of them, marked a new policy upon the part of the king. Probably from early times there is to be found a distinction in the counselling group between those greater barons who looked upon themselves as the more legitimate hereditary royal counsellors and the lesser men, knights or others, some feudal tenants of the king and some not, whom it was the king's pleasure to employ. Surely

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[1] Baldwin, *The King's Council*, p. 71.

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[1] Maitland has said: ". . . it seemed necessary to remind readers who are conversant with the 'parliaments' of later days, that about the parliaments of Edward I.'s time there is still much to be discovered, and that should they come to the decision that a session of the king's council is the core and essence of every *parliamentum*, that the documents usually called 'parliamentary petitions' are petitions to the king and his council, that the auditors of petitions are committees of the council, that the rolls of parliament are records of the business done by the council,—sometimes with, but more often without, the concurrence of the estates of the realm,—that the highest tribunal in England is not a general assembly of barons and prelates, but the king's council, they will not be departing very far from the path marked out by books that are already classical."—*Memoranda de Parliamento*, p. lxxxviii. From certain descriptive terms, applied loosely by the chroniclers to bodies of men of whose technical character they had little knowledge, it has sometimes been supposed that there was more than one kind of king's council at this time. Maitland remarks: "The one point about which I venture to differ from what seems to be the general opinion of modern historians (and I am uncertain as to whether the difference is real) is that I cannot find in the official language of Edward I.'s time any warrant for holding that the king has more than one *concilium*, or rather *consilium;* any warrant, that is, for holding that this term is applied to two or three different bodies of persons, which are conceived as permanently existing bodies, or any warrant for holding that the term should be qualified by some adjective, such as *commune*, or *magnum*, or *ordinarium*. . . . One thing is clear: an order sending to their homes the prelates, earls, barons, knights, and other commoners, 'sauve les Evesques, Contes et Barouns, Justices et autres, qui sount du Counseil nostre seigneur le Roy,' is an intelligible order." *Ibid.*, Introduction, p. lxxxviii., note 1. This conclusion has been borne out by the detailed investigations of Baldwin. Later in the fourteenth century, these descriptive terms did receive some official recognition; but their use reflects no multiplication of councils. As the Council assumed a distinctive character in the thirteenth and fourteenth centuries, it very commonly bore the French name, Conseil. In Latin it had from the early thirteenth century been quite regularly called *Consilium.*

Henry II. and John had many of the latter class in their official households. The truth seems to be that these earlier kings were strong enough to be served by whom they chose, while in the fourteenth century a more continuous and effective baronial opposition was possible. Reform councils, devised of course by the barons, appear to have been artificial and were certainly ephemeral—great lords trying to enter and control a council which was normally and historically made up to a considerable extent of the king's choices from a different class. But whatever the truth on this point may be, continued friction between lords and king over the composition of the counselling group seems to have been an important cause of divergence between Parliament and Council, to have prevented the council core of the early Parliament from becoming a mere division or "house" of that body.[1] From political motives the lords came to look on the Council as something different from themselves and, for certain purposes, something less than themselves. These descendants of the large and small sessions of the king's court were no longer the same; the difference became qualitative and not simply quantitative; the great council, the Parliament (with or without the representative knights and burgesses),[2] the developing House of Lords was one thing, the Council not a wholly different thing, but becoming more so. In their judicial work, the use of the common law by the former and equity by the latter was both a result and a cause in this change.[3] And it is also true that the judges of the central courts, who sat with both Lords and Council, merely advised the former, while, until late in the fourteenth century, they both advised and voted in the latter. The counsellor's oath was the subject of occasional modification and definition in the reigns of Edward I. and Edward II., but was always reminiscent of the form of 1257.[1] Payments to counsellors for their services became frequent early in the fourteenth century; these were sometimes annual salaries, sometimes annuities, and, for minor members, clerks, etc., day wages. But there was nothing in the nature of a consistent salary system before Richard II. In Edward III.'s reign it was thought necessary to have a more permanent and commodious meeting place, and soon after 1340 work was begun upon a building between Westminster Hall and the palace destined for the Council's especial use. At the end of this reign the Council was still large and its membership vague. It might include foreigners, favourites, minor officials, or honorary members. But these people did not share equally the hard routine work. That was doubtless done by a rather small group: an evidence of this is that only part of the members received salaries. As to how far such a group coincided with the members who had taken the counsellor's oath it is impossible to say; but there was no certainty as yet that the regularly sworn members would always be in control. The Council was doing much work in all lines, especially the administrative, and its relations with the king were intimate.

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[1] This separation and general mistrust of the Council accounts in part for the decline in the amount and value of statutory legislation after Edward I., and for the rise of equity; for the Council was the natural place for the preparation and initiation of royal measures. See above, pp. 214, 215.

[2] See below, pp. 397–400.

[3] See above, pp. 208, 209.

As time passed, and Parliament (now including the Commons) became more conscious of its place and possibilities in government, there were signs of a clash with the Council. Late in Edward III.'s reign the situation was growing difficult; the circumstance of Richard's minority made the clash certain. As when Henry III. was a minor the unformed body of counsellors undertook new duties and responsibilities, so in Richard's minority the Council saw occasion to extend its work and authority. From the Good Parliament, 1376, to the end of Henry VI.'s minority, 1437, was a distinct period in the Council's history. It was the time when Parliament made vigorous attempts to curb and manipulate the Council; or, for some occasions, it would be more correct to say, when the baronial faction dominating Parliament sought to attack the barons in the Council. It emerged without having succumbed to Parliament's attacks, but it had undergone some important changes. The history of the Council during this period may be approached by noting what were Parliament's purposes regarding it. The most important was to gain control over its personnel. The formal appointing power lay with the king, under the advice of the lords and prelates; but the Commons tried to specify the qualifications of councillors, wished to be informed of names in advance of appointment, and tried to make sure that its expressed preferences should be regarded after the dissolution of Parliament. There was also an attempt to make the Council a smaller and more definite body than it had been. Parliament's idea seems to have been that it should consist of the Chancellor, the Treasurer, the Keeper of the Privy Seal, a few prelates, earls, and barons, and a sprinkling of knights. When this influence was uppermost, the Council had a membership of from twelve to fifteen; but whenever Richard was able to assert his will it swelled out into larger numbers with the royal appointment of favourites, lesser officials, "evil counsellors" of the traditional type. It was believed, moreover, by Parliament that frequent changes were helpful, and there were some rather unsuccessful attempts to have yearly Councils. In the second place, Parliament tried various regulative measures. With a small and certain membership and all the members sharing in the work with substantial equality, it seemed proper that all should be placed upon a definite salary basis, that salaries be paid by the year or the day, and that annuities be done away with. Parliament also undertook to dictate what business the Council should do and how it should do it; and in this connection came those attempts, already noticed,[1] to limit the Council's judicial pretensions. Finally, Parliament, by means of impeachment, set itself to supervise the conduct of counsellors and keep them from the many kinds of corruption incident to their position.[1]

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[1] A study of the oath forms is most instructive from the point of view of the new oaths derived from the counsellor's oath for officials or departments that were differentiating from the Council, as the Justices and Barons of the Exchequer.

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[1] See above, pp. 220, 221.

Most of this parliamentary control was lost during Richard's last two years of personal and despotic rule, but the same kind of pressure was resumed in the Lancastrian period. Parliament, however, probably exerted more real authority over the Council in the early years of Richard's reign than ever before or after. But the Council was in no sense made over new; its later development was along lines already fairly matured rather than on the basis of the statutory attempts at regulation in this reign. Yet this time of parliamentary pressure left some indelible traces: the Council was never again so large and vague as it had been under Edward III.; its membership was of a higher order and under a greater sense of responsibility; and, though it never lost its legislative and judicial functions, it was at this time that it became established as primarily an administrative body.

During the reign of Henry IV., there were times when king, Council, and Parliament worked together in remarkable, if somewhat strained, harmony. The control of Parliament was such that the phrase "ministerial responsibility" is bound to suggest itself, and under this vigorous supervision the Council reached a high degree of efficiency. In the notable governmental scheme of 1406, which received the king's assent, is seen a small administrative group working with the king and yet bound to reflect the sentiment of Parliament.[2] But the plan as a whole was not sustained, especially that part relating to a change in the Council's membership at each new Parliament. Parliamentary control was reasserted, however, in 1410, and there was then appointed the most notable and successful Council of Henry IV.'s reign, the Council which contained the Prince of Wales. When this prince became King Henry V., though he was a king indeed, yet he maintained for the most part a Council of the type which Parliament favoured. It was small and aristocratic; its judicature and administration important, its legislation slight; it merited Parliament's confidence, the only real point of controversy being Parliament's attempts to control its judicial activities in the supposed interest of the common law; but the old scheme of salaries fell into almost total disuse. The long minority of Henry VI. required no special council of regency; the Council's activities and authority naturally expanded to meet the emergency. It showed great stability during this time and worked harmoniously with Parliament; the counsellor's oath was given its final form in 1425, and the clerkship of the Council, which had been an office growing rather irregularly before this, became stable from the beginning of Henry VI.'s reign and a post of trust and importance. Altogether, the minority may be considered the time of the Council's highest development in the middle ages. Yet the medieval Council was at no time rigidly limited in membership to the group whose main work was to counsel the king and who had taken the counsellor's oath. Despite all Parliament's control, the king upon occasion asked in whom he chose; the Council itself did the same; and lords often came when they were not asked.

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[1] The articles of impeachment drawn in 1386 against the earl of Suffolk, who had been Chancellor, excellently illustrate the nature of fourteenth-century "graft."—A. and S., document 93.

[2] For further comment on the governmental significance of this period, see Pt. III., § III., 8. "When in 1406 the house of commons told the king that they were induced to make their grants, not only by the fear of God and love for the king, but by the great confidence which they had in the lords then chosen and ordained to be of the king's continual council, they seem to have caught the spirit and anticipated the language of a much later period."—Stubbs, *Constitutional History*, § 367.

A time of great power is almost sure to be a time when power is abused, and there is evidence of this in the case of the Council. Through the Council and through the lords in Parliament or in meetings of the "great council" when there was no Parliament there were attempts to place over England a government by and for the baronage; and the English baronage of the fifteenth century had many unlovely features. There were favour, special privilege, perversion of justice. Especially were there attempts upon the part of the baronage to gain all possible control of the royal patronage and favour, the dispensing of offices and rewards, and this through control of the hierarchy of official seals—signet, privy seal, great seal.[1] Long and technical was the fight to control the affixing of these seals and hence the documents which they validated. This control was greatest during Henry VI.'s minority and probably that unhappy monarch's most vigorous and successful effort when he came of age was to reduce the Council's power at this point.[2]

Between 1421 and 1435 a record of the Council's business was kept which has been known as the Book of the Council and which has until recently been regarded as the beginning of a permanent official record. But there is no certainty that it lasted beyond this fourteen-year period and it was clearly unofficial, probably the undertaking of the clerk. As a court, the Council was not a "court of record." Some courts are not because they are minor courts; the Council was not because it was too high a court. It was the parent of courts. Its acts, whether judicial or administrative, might on occasion be inserted in the records of other courts or in the chancery rolls; for itself it made, and had from early times, informal notes for present use. It was not obliged to record formally, for it was answerable to no one and precedent did not bind it. Its note-keeping developed in proportion to its growing work and importance in the period beginning with Richard II.'s minority, and in the years 1392 and 1393 its vigorous clerk, John Prophet, kept a journal or register much like the later Book of the Council.

For a few years after the minority ended there was no great change except some recovery of Council control by the king; but with the rise of the Earl of Suffolk and the king's marriage to Margaret of Anjou, whose arrogance and lack of knowledge of the English government were disastrous factors in the case of a king weak and periodically insane, the Council rapidly declined. It was no longer consulted on high questions of policy, and had only the pettier matters of administration to attend to; parliamentary control was at an end, and those features for which Parliament was responsible in the preceding period were passing away. Cade's rebellion in 1450 was a movement largely political, and a prominent demand was for reform in the Council; we hear, as of old, of "evil counsellors" and the neglect of great lords. The masterful lords or prelates who controlled the king now, or who later upon occasion controlled even the Yorkist kings, were not doing it as members of a recognised and regulated organ of government. There were efforts at reform in the years following, but they were unsuccessful, and by 1453, the year of the final debacle in France, the Council had reached a state of great weakness. There was some revival during the two following years while the Duke of York was in power, but the Wars of the Roses were at hand and "manifestly the real issues of the time were passing from the control of parliaments and councils into the fields of battle," and in the late years of the reign the Council almost ceased to exist.

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[1] See below, pp. 322, 323.

[2] See T. F. T. Plucknett, *The Place of the Council in the Fifteenth Century*, Transactions of the Royal Historical Society, Fourth Series, vol. i.

There was no important recovery under the Yorkists. Council and Parliament suffered together, as was bound to be the case with legitimist sovereigns who at the same time were not statesmen and had no important programme or constructive policy. The Council continued to function in a small administrative way and was of considerable size, but its judicial work was almost nil. There was some renewal of activity in the latter field under Richard III., and then the unhappy period was at an end, fortunately a period so short that the memory of the Lancastrian Council remained. In Fortescue's *Governance* *of England*, written in the reign of Edward IV., was set forth the theory of the Lancastrian Council, set forth with emphasis, for Fortescue believed that the Council should play a great rôle in government. But he had seen the end of the Lancastrian period and of the Council's greatness, and he understood how the Council had contributed to its own downfall by baronial and oligarchic purposes and by injecting into a great public body much business of a personal and selfish sort. He sought to picture a Lancastrian Council purged of its greatest evils. The story of the complete and sudden rehabilitation and reorganisation of the Council under Henry VII. and Henry VIII. and its prominence all through the Tudor period is a great story, but it does not belong in this book.[1] Yet it may be remarked that the Tudor Council was always a Council under royal control and that its greatness was a different greatness from that of its Lancastrian predecessor.

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[1] To the end of the middle ages the one word Council was the name oftenest applied to this body, although a number of adjectives descriptive of its traits occasionally accompanied the noun and even gained some official recognition. Among these, "secret" and "private" appear, evidently contrasting the smaller and more confidential council with the summoned great council or Parliament. But the modern term Privy Council did not become a common or accepted name until the Tudor period and resulted from a change which belonged to that period, but a change which had roots in the past. The medieval king travelled much, and usually had with him a group of counsellors; in the reigns of Richard II., Henry IV., and Edward IV. this group became more distinct and definable within the Council than was wont, but did not acquire a name. It reappeared under Henry VII., and was recognised and organised by Henry VIII. The great pressure of business was bound to produce some such differentiation. At the same time a distinction was being made between ordinary counsellors and privy counsellors. The more regular and intimate counsellors and those of higher rank were the latter; those of lower rank and used for their more technical knowledge in various lines were the former. The group around the king when it consisted mainly of privy counsellors, as was generally the case, was called the privy council; the bulk of the Council was at the star chamber in Westminster. As the more important counselling functions lay with the newly organised group which followed the king—the group which became more regularly called the privy council—the larger Council, the direct derivative of the Council of earlier days was little more than the Council acting in its judicial capacity, that is, the Court of Star Chamber. For the smaller and more definite Star Chamber membership prescribed by Henry VII.'s statute of 1487 (see A. and S., document 136) did not outlast the early years of Henry VIII.'s reign. When, then, the Court of Star Chamber was abolished by the Long Parliament in 1641, the only Council left was the Privy Council, the branch organised under Henry VIII. This is the origin in substance and in name of the Privy Council of modern times.

3. **The Organs of Administration: Exchequer, Chancery, Wardrobe, and Chamber.**—As already stated,[1] the Council was the king's general advisory body retaining its early governmental competence even after courts and Parliament had differentiated and become fundamental features of government. The Council was not a specialised executive body. A measure determined on by the king alone or by king and Council might be embodied in a writ of great seal, and so become an act of Chancery. It might be translated into a writ of privy seal and thus become a function of the Wardrobe. If it mainly concerned finance, it was very likely to result in a writ under the seal of the Exchequer, and accordingly the executive agent was the Exchequer.[2]

Exchequer, Chancery, and Wardrobe were all specialisations out of the earlier counselling and governing group that has been referred to as the king's household or court; and all of course—the Exchequer especially—did much routine administrative work which could in no immediate sense be considered an execution of the measures or orders of either king or Council. The Exchequer was the first of these specialisations, and it has been shown that even under the Conqueror financial organisation was growing most rapidly and already had rather special administrative and even judicial features.[3] Perhaps the Conqueror's chief care in government was to increase his revenue and to develop and organise everything which had to do with its collection. These traits were prominent in his sons' reigns, and it is easy to understand that the first highly developed department of administration had to do with finance.

About the middle of Henry I.'s reign, a new method of

[1] See above, p. 293.

[2] Tout, *Chapters in Mediæval Administrative History*, ii., 147.

[3] See above, pp. 123, 124.

accounting was instituted which had revolutionary results. The exchequer, the checkered table, was a form of the abacus, and was introduced into England from France, probably from Laon where there was a famous school. Treatises upon exchequer reckoning were being written at Laon and the school was frequented by Englishmen.[1] Undoubtedly the founding of the exchequer method in England was the work of Henry I.'s great justiciar, Roger of Salisbury, and his kin. It indicates

> a revolution in the method of auditing accounts; it means the introduction of a precise system of calculation worked out by counters on a chequered table and recorded on rolls. Thenceforward the Treasury was limited to the payment and storage of money; the business of account and the higher work of judicature passed to the Exchequer.[2]

How highly trained and specialised an exchequer staff there was in Henry I.'s reign it is impossible to say. The whole Exchequer institution was in the king's household, in his court, and that court was then substantially feudal; but it is hard to think of the Exchequer as having been wholly or largely in the hands of the king's feudal vassals.

Through its great reorganisation in Henry II.'s reign, after practical non-existence during much of the reign of Stephen, the Exchequer reached a high degree of technical development and efficiency. Our knowledge of it for this time is very full owing to one of the most remarkable books of the English middle ages, the *Dialogue Concerning the Exchequer* written by Richard Fitz-Neal, grand-nephew of Roger of Salisbury, a member of "the most characteristic official family of his time."[3] This account tells of the appearance of the sheriffs spring and fall before the table to render payments of the regular revenue owed the king from the counties; and besides the sheriffs, the bailiffs of the honours and royal boroughs which accounted separately.[1] Half was owed at the Easter term and half at Michaelmas. The sittings and the ceremony at the table are described in detail. It was an oblong table about ten feet by five. At one narrow end which may be thought of as the head of the table, sat the chief officers. When the king attended a session, as he sometimes did, he of course presided. When he was absent the Justiciar was supposed to represent him here, as in all other capacities. On the Justiciar's right sat someone (the Bishop of Winchester at just this time) supposed to keep a watchful eye on the king's more personal financial interests, the forerunner probably of a royal *remembrancer*,[2] and on his left the Chancellor; then further, on a bench extending beyond the table, Constable, Chamberlains, and Marshal. But before the end of Henry II.'s reign, Chancellor and Constable were probably not present in person at the routine financial meetings; they would be represented by their more technically trained clerks—when points of difficulty arose they would come, especially if those points were of a judicial nature. At the opposite end of the table sat the particular sheriff or bailiff, who was rendering his account; at his left another man watchful of the king's personal concerns directly across from his fellow at the upper end of the table; and at the sheriff's

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[1] The word *scaccarium*, exchequer, meant a chess board, a board divided into squares. The exchequer system was introduced into Normandy from England, Henry I. being also Duke of Normandy after 1106.

[2] Poole, *The Exchequer in the Twelfth Century*, pp. 40, 41.

[3] "The Dialogus, which was completed in 1178 or 1179, was written by Richard Fitz-Neal, treasurer of England, 1158–98, and bishop of London, 1189–98. It is in the form of a dialogue between a master and his disciple, and consists of two books. The first book describes the organisation of

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the exchequer, its writs and rolls, and the functions of its officers. The second book treats of proceedings in the exchequer, the collection of debts, the manner in which accounts are rendered by the sheriffs, and the various sources of royal revenue. The treatise also contains much information regarding other institutions."—Gross, *The Sources and Literature of English History*, p. 418.

[1] About fourteen boroughs and a varying number of honours so accounted. Guardians of temporalities of vacant bishoprics and of escheats accounted at the Exchequer; also guilds of craftsmen paying yearly license duties, though probably the sheriffs accounted for some of these.

[2] In original meaning, apparently, a man whose office it was to bring to the king's remembrance or attention those items of revenue or phases of financial administration which were of special concern to him personally.

right, along a bench extending beyond the table, probably other sheriffs and bailiffs awaiting their turns. The long side of the table to the right of the officers was devoted mainly to those in charge of the rolls. Nearest the head of the table was the Treasurer; next him the writer of the treasury roll, the "great roll of the pipe" it came to be called[1]; then the writer of the Chancellor's roll, a duplicate roll kept at first as a kind of check upon the treasury roll; and below him the Chancellor's clerk and the clerk of the Constable's office. The other long side of the table was mostly for the reckoning and receipting. Probably in the center was the calculator who could thus reach in either direction and manipulate the counters; at his right those who cut the tallies which were the evidence of receipt, and at his left the clerk of the writing office, an important official in charge of the Chancellor's writing staff. The original, fundamental part of the sheriff's payment was the "farm" of the county, including mainly the rents from the king's lands and the fines from the local courts. But the sheriffs often had other things to account for: the profits of royal justice in the itinerant justice courts, Danegeld, scutage, aids, etc. There is no doubt that from the twelfth century the "farm" amounted to relatively less in the king's income and the other revenue paid in by the sheriff relatively more.[2] This is but a hint of the detail and technicality as they had developed at the famous table in the course of the twelfth century. In the period following, as was bound to be the case in a progressive government, there was constant change and elaboration; but there will always be a special interest in the picture which Henry II.'s famous Treasurer drew, moved to the performance, no doubt, by his own sense of the uniqueness and greatness of the institution with which he and his family had been identified.

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[1] Undoubtedly because the individual strips of parchment, called *membranes*, on which it was written, would roll up and look like a tube or pipe.

[2] The "farm" suffered greatly under Stephen, when much royal land was alienated.

In the reign of Henry II. the Exchequer accounting and auditing was held regularly at Westminster, though it could then and for long afterwards, upon special occasion, be held elsewhere. The treasury was still at Winchester, but it had now become what it was to start with, a storehouse. But the receipt of much money at Westminster made a temporary storage there or in London a necessity; and the packing of it in chests and the carriage of these to Winchester were burdensome. Quite naturally the treasury at London came to supersede that at Winchester, and this was accomplished by the early part of Henry's III.'s reign. It was one of the many changes in the late twelfth and early thirteenth centuries which were making London and Westminster the recognised seat of government. So far as the treasury had been in any sense a department of government it was now absorbed by the Exchequer, and there was no treasury as a separate financial department until after the middle ages.

By the late twelfth century the Exchequer was manned largely by skilled specialists in finance, and before long its judicial side was specialised, professionalised—the Barons of the Exchequer were justices of a court of special competence, not ordinary feudal barons.[1] This means that the Exchequer had gone, or was very rapidly going, "out of court." It did not follow the king, it was not a part of his personal entourage or household, its members were not giving him counsel on general policy or unspecialised points of administrative detail. It was splitting off from the parent stem of the king's court. In the time of Henry III.'s attempted personal government there was some effort to reverse this process, but it had no lasting effect. The Chancellor pretty definitely left the Exchequer at the beginning of John's reign. His clerk remained, but hardly as the Chancellor's representative. The king appointed him. He was keeper of the Exchequer seal, a duplicate of the king's seal,[1] the existence of which before the end of the twelfth century is an evidence of the Exchequer's separation from the king's court. This official was soon one of the most important in the Exchequer, and finally became its head, the Chancellor of the Exchequer.

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[1] See above, p. 176 and note 3.

When the Chancery ceased to have any oversight or control in the Exchequer, and the writer of the Chancellor's roll served no longer to check the treasury roll, the function was served by two royal *remembrancers* whose forerunners can probably be seen at the table in Henry II.'s reign as described in the Dialogue. To begin with, confidential agents of the king, they became regular Exchequer officials, skilled in routine; and, as the Treasurer became a grand official having less and less to do with financial detail, this part of his work fell largely to the *remembrancers*. But in the thirteenth century the Treasurer as well as the king had his *remembrancers*, those of the king dealing more especially with the occasional or exceptional forms of revenue, those of the Treasurer with the fixed revenue. In the higher realm of Exchequer policy and supervision, the Treasurer's place was being taken by the Chancellor of the Exchequer.

Before the end of the thirteenth century the Exchequer had taken over in part the national accounts—those things which did not relate to any one county, honour, or borough—as, the forests, the Channel Islands, the customs duties, and, in the fourteenth century, Wales, Gascony, and Ireland. At the same time, while the Exchequer year still had two terms which began at the old times, the old short periods had passed; now the Exchequer was in almost continuous session. Its judicial work helped towards this as well as its increasing financial work. Its year tended to become like the years of the Benches. But while its financial competence was expanding in one direction it was being cut into in another; the king had gone a long way in building up a financial department under his more personal control. The completion of even a slight summary of financial administration in the later middle ages must, however, follow some notice of other developments in and out of the royal official household.

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[1] See below, pp. 312, 318. The Exchequer thus came to have its own sealing department, and the resulting control of its official documents.

The Norman kings of England had their chapel and the chaplains of this, along with their other duties, were the king's writing staff. At the head of these was the Chancellor, who by Henry I.'s reign was keeper of the king's seal. Perhaps he had kept the seal earlier; perhaps there was a Chancellor who kept the seal of Edward the Confessor, who first of English kings had a seal. The seal was a revival, after the dark ages, from the Roman Empire. Its appearance in England was due to the continental influence under Edward. His seal was a double-faced, pendant seal, and the Conqueror's seal was based upon it. At about the same time feudal nobles were beginning to use seals, which were displacing signatures and crosses of witnesses, and in some parts of Europe (not England or northern France) partially displacing the employment of professional notaries. The heading of the king's secretariat and the keeping of the king's great seal, which meant much control of the documents authenticated by it, were the basis of the Chancellor's power as a great officer of state and the development under him of the Chancery as a great department of administration.

The class of the king's letters which in the course of the twelfth century became the technical judicial writs had a notable effect upon the department which issued them: they greatly increased the work and importance of the Chancellor and his force, and they brought the Chancellor for the first time into close and professional contact with the judiciary.[1] Chancery grew rapidly under

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[1] On the judicial writs see above, pp. 142–144, 151, 152. It has been convenient to deal earlier with Chancery's development, in the fourteenth and fifteenth centuries, as a court of civil equity. See Part III., § I., 3.

Henry I. and in Henry II.'s time was a well developed secretarial department in the official household, mightily affecting the growth of law through its making of writs. Chancery was in the same building as the Exchequer, perhaps in the same room in which spring and fall the Exchequer sat. The Exchequer when in session had occasion to use the Chancery clerks, and the limited periods of the Exchequer kept it from interfering much with the Chancery. At that time there was no notion that different offices or departments should have separate buildings, or officers separate rooms. Indeed there was not yet much separation in the king's great official family. But the Chancery staff kept growing with the great increase of writs and royal letters and documents of all sorts, Becket did much to exalt an office which had been a humbler office before him, and there was further increase in its dignity through William Longchamp at the beginning of Richard I.'s reign.[1] But perhaps it was Hubert Walter's great work as Chancellor that brought Chancery to the point of separation from the Exchequer at the beginning of John's reign and inspired the beginning of the great Chancery enrolments.

In the matter of enrolments the Exchequer came first with the pipe rolls which began under Henry I., and were renewed and made continuous under Henry II. These perhaps suggested the plea rolls of the king's courts, which began regularly in 1194. Then came the Chancery rolls, which began with the charter rolls in 1199 and were followed almost immediately by the patent and close rolls.[2] To the exceptional efficiency and regularity of the English secretarial department we owe this magnificent set of Chancery enrolments which furnishes from the beginning of the thirteenth century an unbroken record of administration such as is to be found in no other country in Europe. The Anglo-Norman and Angevin Chancery was leading Europe, for Anglo-Norman and Angevin kings were leading Europe in nearly everything which related to centralisation and governmental competence. It was the time of the English kings' greatest power.[1]

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[1] Soon the Chancellors were too great and dignified to do much routine work and we begin to hear of vice-chancellors.

[2] These three types of royal letters had been differentiating under Henry II., and appear under these names with the beginning of enrolments. Charters, letters patent, and letters close "were the instruments by which the kings of England made grants and transacted much public business of importance. 'By the first their more solemn acts were declared, by the second their more public directions promulgated, and by the third they intimated their private instructions to individuals.' These three series of records contain grants of lands, offices, privileges, and the like to individuals or communities, mandates to royal officers, etc.; the patent and

Till the end of Henry II.'s reign the Chancery was clearly a part of the royal household, still travelled with the king. But with the exaltation of the Chancellor's office in the years following there were longer and longer absences of the Chancellor and his staff from the travelling household; with its increased size and functions the Chancery was inevitably becoming more stationary and less personal to the king; it was becoming an organised office of state, it was "going out of court." In the thirteenth century this process was favoured by the barons in their rivalry with the king, for they could more easily control a department thus separated from personal contact with him. But Henry III. felt this situation and resented it, and on this point there arose a long strife between king

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close rolls also comprise truces, treaties, diplomatic correspondence, and documents concerning the revenue, judicature, and other branches of the English government. Royal charters and letters patent, though they often resemble each other as to their contents, are distinguished from each other as regards their form. The charters are addressed 'to the archbishops, bishops, abbots, priors, earls, barons,' etc., and are executed in the presence of various witnesses; whereas letters patent are addressed 'to all to whom these presents shall come,' and are usually witnessed by the king himself. . . . Letters patent were so called because they were delivered open, with the great seal pendant at the bottom; but in this respect they do not differ from charters. Letters close . . . were mainly royal mandates addressed to one individual or more; therefore they were closed and sealed up on the outside"—Gross. *Sources and Literature of English History*, pp. 463, 464. The letters close are of the most value to the historian. They contain the greatest variety of information, telling directly much about government, especially royal policy with respect to local government (see below, pp. 325, 326), and more or less indirectly about economic, social, and other phases of the people's life.

[1] See above, pp. 263, 264, 268.

and barons which left its stamp upon all the later history of Chancery. Henry early in his reign sought to keep a more personal control, even to the point of trying to be his own Chancellor. Such attempts so weakened the general administration as to throw the weight of the argument on the baronial side. In 1244 the barons demanded the choice of Chancellors in the great council (then just beginning to be called a parliament), Chancellors who, of course, would be of the independent, aristocratic type. There followed a time of strife during which the Chancellorship was either in abeyance or present in such a faint replica as hardly to deserve the name. The consequent governmental disruption was one of the many things which led to the crisis of 1258 and the following war. In this period the old office of Justiciar, the vice-regal office necessitated by the long royal absences from England in the earlier time, went out of existence. The royal triumph of 1265 together with the attained dignity of the Chancellorship were forces which counted against its revival, and its non-revival helped to make the office of Chancellor the highest office in English officialdom. At the end of Henry III.'s reign it is fair to say that king and barons had had something of a drawn battle over Chancery—the restored Chancery of the late years of the reign bore marks of baronial "constitutionality" and also of royal-court control. On the whole Chancery was going out of court very slowly, much more slowly than the Exchequer had. Even under Edward I. the Chancery clerks were theoretically in the household. But by the last years of Edward II. a great change had taken place, a change produced by time and also a change which like so many others in this reign resulted from the governmental maturings and readjustments forced by the king's incompetence. The Chancellor was no longer to be regarded as a household officer, he was the chief minister of state. The bureaucratic features of Chancery were becoming marked. The Chancellor was building up a "household" of his own consisting of the Chancery clerks—a well organised professional group offering an attractive career. This group did its administrative and secretarial work little disturbed by whether the Chancellor for the time represented royal or baronial preponderance in state affairs. Chancery had definitely gone out of court.

When the Exchequer went out of court it took from the court the receipt of money, though not of all money; when Chancery was going out of court it was taking the great seal and secretarial department. Their going meant a growth in officialdom, a governmental maturing; it also meant, or was coming to mean, more baronial control. In either case it meant less primitive, personal government by the king. But the king was powerful and the time early; it was to be a long time before government in England was to cease to be personal and the main motive force to lie outside the king, whether with aristocracy or with the people. Hence at this point the process of reduplication began; the king must have a finance department personal to himself and a secretarial staff with him, under his personal control, and we begin to hear of the Chamber, the personal core of the household, becoming a second treasury and of a small seal for the Chamber to authenticate documents. New finance and secretarial departments were beginning. Yet one must be cautious in describing these changes. When we say that the Exchequer and Chancery had gone out of court and that the Chamber remained in the court or household, that is not the same as to say sharply that Exchequer and Chancery were public, belonged to the state, while the Chamber was in the king's private establishment. Such distinctions pertain to modern times, not to the middle ages. In a sense all features of government—courts, Parliament, Council, organs of administration—even England itself, were the king's in something of a personal way; while on the other hand the growing Chamber organisation was far from being what at present would seem personal and private, even for a king. Those departments which had gone out of court were less under royal control, had in part escaped from the king, were at least debatable ground for king and barons to fight over. The barons of England, not without some justification, thought themselves entitled to speak for the nation; what is more remarkable they sought not to destroy but to fulfill; they kept the efficient things of government, things which bore no feudal trace and which had been made by the royal enemy. The king in a formal sense, *was* the nation. When he found himself losing in the fight to control Exchequer and Chancery, he began, sometimes instinctively, sometimes more or less consciously, to manœuvre for the lost ground. He began to shape out of the yet undifferentiated household duplicate offices and seals, and with patience and finesse, under cover of forms, technicalities, and fictions, he sought really to do again what earlier kings had done. But the king was doomed finally to lose, as he had lost before. He was under the law. The barons of the later middle ages felt it their function to keep him under. A king under the law could not, in their thought, be untrammeled in finance and general administration. That he should be was hostile to the personal interests of the barons; but they rather grandly identified their personal interests with the concerns of the nation, and the king's subordination to law was an early expression of the national idea. A very brief account of the way in which these forces found expression in administrative institutions must be given here.

The Exchequer never received all the royal revenue. As this finance department became less personal to the king, as it went out of court, he became more concerned about what was to be paid into the Chamber. When we first catch sight of the Chamber as a "second treasury," already traditionally some officers were accounting to it rather than to the Exchequer; perhaps there were already "chamber manors" in the twelfth century, certainly early in the next century; and some types of revenue which went regularly to the Exchequer might be quite capriciously diverted to the Chamber. Also the Chamber, before the end of the twelfth century, was doing a good deal of general administrative business and kept a roll which is to be distinguished from the Chancery rolls; and the increasing absences of the Chancellor and consequently of the great seal from the royal presence caused another and more personal royal seal to come into existence. By the reign of John there were three seals: the great seal kept by the Chancellor, a duplicate of the great seal kept in the Exchequer, and a small seal or privy seal kept by a clerk in the Chamber. But as Chancery went out of court slowly, there was confusion and overlapping: Chamber documents sometimes sealed in Chancery and documents authenticated with the small seal appearing in the Chancery enrolments. However, after 1208, most Chamber documents received the small seal and not many years afterwards no such documents were inserted in the Chancery rolls. At the same time the feudal element in the Chamber was being displaced by a clerical, official element.

No sooner was this Chamber organisation well started than we begin to hear, already in the reign of John, more of the Wardrobe and less of the Chamber, and the Wardrobe continued to figure as the heart of the royal household for at least a century. We have noticed that there was an importance attaching to the king's sleeping place and storage place, his chamber and his wardrobe, in early times.[1] There was a wardrobe servant before the Conquest. By Henry II.'s time the royal wardrobe was an important place of safe deposit with a considerable staff. In John's reign, the term applied both to a place and the things kept in it. We hear much of the carts and horses or boats that carried the stuff of the wardrobe on the king's constant journeys. There were the household arms and armour, saddles and harness of the horses, and the chests and bags in which the robes, etc., were carried. Also the king's more private hoard or purse was divided between chamber and wardrobe, with sometimes so much money in the wardrobe that it had to be carried in casks. Facilities for safe-keeping developed in the wardrobe were making it in the same reign a place of deposit for important documents. Its elaborated staff extended all the way from the clerk who kept its roll and cared for its treasure and documents (forerunner of its later "keeper" or treasurer) through various sergeants and valets down to the carters and the drivers of the pack-horses. In just what way the wardrobe got the start over the chamber at this time as the phase of the royal household which was to receive the new political development is not clear. Quite possibly because it had such an equipment of chests and bags, because it was a storage place and not a sleeping place. The grander the king the more stuff he had and the more important the wardrobe in contrast to the chamber. Perhaps it was partly a matter of language: as the wardrobe bulked larger in men's attention they would be more likely, in referring to the arcanum of the royal household, to say wardrobe than to say chamber. At any rate it would be hard to prove that any other household arcanum had a political growth or significance for a full century.

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[1] See above, p. 52.

As Henry III.'s reign began the Wardrobe was growing as a finance and general administrative organ; it was becoming a domestic chancery. In the matter of expenditure, its business related to the unusual as contrasted with the routine expenses; it sought to finance court festivities and military undertakings at home or abroad. There was marked Wardrobe development resulting from Henry's Poitevin expedition in 1230, and already there was a trace of war office and admiralty. The royal-baronial struggle of this reign touched the Wardrobe as other parts of government, though its development depended more upon a normally maturing state. The royal triumph of 1227 had been followed by a baronial success, and then in 1234 began Henry's great experiment to bring all the baronial-national departments which had split off back under the royal-household-personal control. The barons triumphed in the Barons' Wars, keeping in 1258, as always, most of the machinery which had developed in earlier times of royal control. Henry had been making much use of the privy seal, and during the Chancellor's abeyance the great seal was often kept in the Wardrobe. Now Henry sought to fight the Provisions of Oxford with the small seal, an interesting comment upon the relation of that seal to the great seal now again kept by a baronial Chancellor. There is evidence that the validity of Henry's grants during the troublous years, whatever seal he used, was later regarded with suspicion, and many documents it was thought best to have resealed.[1] The privy seal had become distinctly the Wardrobe seal and was in the custody of Wardrobe clerks.

The vigorous personal government of Edward I. emphasised every phase of household administration and retarded any tendency of the Wardrobe to split off and become a separate department of state. Indeed Edward maintained close relations with the Chancery, and even the Exchequer. Yet it was a time of rapid development. Early in the reign the Wardrobe attained a stable organisation, with officers and staff;[2] though still travelling much, it was coming to have headquarters in London, with a storehouse or treasury distinct of course from that of the Exchequer;[3] and Wardrobe officials were becoming very influential in general government, sometimes forming a kind of inner ring in Council or Parliament, and incurring the opposition of the barons who were seeking to uphold the Exchequer and Chancery. The most striking development came late in the reign, and was the result of war. The magnitude of Edward's military undertakings was far beyond anything of the sort that English kings had known before. The Wardrobe in wartime became very powerful. It managed both army and navy and was in general the ruling force in the state. For the time being Exchequer and Chancery were not at all prominent and were perforce co-operating with the Wardrobe.[1] But opposition to too much personal rule, especially as shown in the use of the Wardrobe and privy seal, was the great factor in the years of desperate struggle following 1297. It found clearest expression in the "Articles upon the Charters" of 1300, where such exercise of power was represented as infringing Magna Carta and the common law. Thus the reign ended, not so differently from the reign of his father, with which one is likely to contrast it at all points: after a long period of quiet, again baronial opposition to personal rule, aristocracy claiming to speak for the nation *versus* autocracy armed with new bureaucratic apparatus.

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[1] About this time there is occasional mention of a "royal ring" used for some kinds of authentication—possibly a foreshadowing of the "signet" of the fourteenth century.

[2] Its head was the Treasurer or Keeper, not to be confused with the Exchequer Treasurer. The Controller of the Wardrobe, head of its secretarial department, became the keeper of the privy seal, now less a personal seal of the king than formerly.

[3] In this reign its treasury passed from Westminster to the Tower. This is how the regalia got to the Tower, never to leave.

Under the weak Edward II. this Wardrobe organisation was bound to be attacked. It was not mentioned by name in the New Ordinances, but was clearly aimed at in the provisions to restore the Exchequer, to limit the royal right of prisage, not to disturb or delay the law of the land by letters under privy seal, to appoint a commission to hear complaints against the king's ministers, and to remove the evil, *i. e.* household, counsellors. As the reign progressed, the incompetence of both Edward II. as leader of the court party and of Lancaster as leader of the baronage led to a combination of some of the saner elements from each; and the circumstances of the reign begat much political planning of a reforming nature. The Wardrobe had been the informal part of government, free, untrammelled, the thing the king used in order to set up anew his power against Exchequer or Chancery. Now the attempt was to make the informal part of the administration formal—at least in times of peace; to define the Wardrobe, limit it, stereotype it, cut out its "abuses," keep it from playing a national rôle. The origin of an independent keeper of the privy seal is to be found in the provision of the New Ordinances appointing a suitable clerk for that function who was to be responsible to Parliament. Thus baronial influence started the process by which the office of privy seal began to be a distinct office in the Wardrobe and finally, with its staff, went out of the Wardrobe to become an independent office of state. Before the end of Edward III.'s reign, the Keeper of the Privy Seal ranked next after the Chancellor and the Treasurer among the great ministers of the Crown.

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[1] While the forms were kept for the Exchequer, the Wardrobe was becoming the real financial department. Some of the general taxes went directly to the Wardrobe and, under the king's direction, it was expending money it had received from the Exchequer. It was more plastic than the Exchequer and was taking the lead in solving the financial problems of the time—the development of the use of tallies from a receipt into a credit system, and the handling of the short-term foreign loans. It "was to a large extent both war office and admiralty, as well as the body ruling the household and state. It was even more specifically the army pay-office, the central ministry of recruiting and national service, the clothing and stores department, the ministry of munitions, the board of ordnance and the controller of such engineering, mechanical, and technical services as then existed, the army service corps, and the ministry of information. Moreover, all that it did for the army it also did for the navy. . . ."—Tout, *Chapters in Mediæval Administrative History*, ii., 143. Nevertheless, Edward was badly in debt and his finances confused late in his reign—much more confused than at the end of Henry III.'s reign. It was years after Edward's death before his accounts were settled. War had its usual demoralising effect upon the state.

Notwithstanding the somewhat forced harmony between Chancery and Wardrobe in this reign, the most important permanent grants must be authenticated by the great seal even if they had already passed through the Wardrobe and received the privy seal.

When the barons were getting control of the Wardrobe under Edward II., they thought they were getting control of the essential administrative household. But the old process of duplication began once again. What the king proceeded to do, with considerable temporary success, was to duplicate the Wardrobe machinery under an old name, *chamber;* when the "reformed" Wardrobe proved less useful to the king, the heart of the personal, household organisation was reappearing as the Chamber.

While the Despensers were in power the Chamber growth was rapid. With the baronial control of the privy seal, new and more personal seals began to appear (the secret seal, the griffin seal, etc.), kept in the Chamber. And the Chamber began to have a treasury with its special sources of revenue. Indeed for this period it would not be hard to show three treasuries, for Exchequer, Wardrobe, and Chamber respectively; and four chanceries, *i. e.* secretarial departments, each with its appropriate seal, for Exchequer, Chancery, Wardrobe, and Chamber. But this duplication of the Wardrobe by a revived Chamber was superfluous; it accomplished nothing but confusion. Duplication could be carried to such lengths as to be absurd. By 1322, the anti-royal forces had pretty well nipped the Chamber in the bud. In the course of the fourteenth century some Wardrobe offices went out of court and became offices of state, while some parts of the Wardrobe organisation slipped back into purely domestic phases of the royal household.[1] In the Lancastrian period the king had little chance to play the game of personal government, but later in the fifteenth century there was a renewal of household activity, and much administrative work was passing from the Chancellor to the king's Secretary. *Secretary* only gradually became a title of office; it meant at first any confidant of the king. The Secretary, or one of the secretaries, had been keeping the king's signet which was the latest of the king's personal seals and the signet office was developing; the future lay with the Secretary—the future of personal government—but that future was the Tudor period.

In France the king had been able to maintain one great royal chancery, which, because it was the place for sealing with the great seal was the source of all the great ministries, and was an important basis of the king's absolute power. There had been no charter history in France comparable to that in England, the baronage for many reasons was a different baronage, and the slogan that the king was under the law did not arise. The English king had not been able to hold his chancery to a unity. The long-continued and constantly shifting royal-baronial conflict was the main cause of the repeated duplications and the existence at any given time of departments of government relatively personal to the king and of others more baronial, or, as the barons would probably have been pleased to term them, more national. The results of aristocratic opposition in England are to be found in Parliament, though not until the late middle ages and not very consciously worked out; they are to be found in all the long history of Magna Carta and in the depositions of two kings in the fourteenth century; but they are also to be found in these unpremeditated and peculiar developments in the sphere of what we may venture to term general administration.

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[1] Chancery's growth as a court (see above, pp. 216–218) kept it from regaining any household control at this time.

4. The King's Use of the People in Government.—Some of the ways in which the mass of the people took part in government have been shown. In the Anglo-Saxon period there was much that indicates that the local government was older and more important than the central government; the people were still, at the end of the period, running their local courts in a way that reminds us of a time when it was that kind of government, sprung from the people's initiative, or nothing.[1] In the early post-Conquest time, the local government, now feeling the stern touch of authority from the center, continued important and, as in the case of the frankpledge system, was being completed and organised; and it reached down to, and demanded the service of, the very lowest classes.[2] But what was to be the permanent policy of the great Norman and Angevin kings? How were they to meet the problems of local law and order and the minutiæ of local administration? It is not hard to imagine the first indication of an answer to these questions even in the reign of William the Conqueror. Most of the information in his vast Domesday investigation was obtained from sworn groups of the people; he hated to trust even the execution of the survey to officials; and we read the tremendously significant record of how

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[1] See above, pp. 66–69.

[2] *Ibid.*, pp. 108–110.

> he sent inquisitors after inquisitors and men not acquainted in the districts to which they were sent, in order that those who followed after might check the report of those who went first and lay open their falsifications to the king.[1]

The kings that followed showed the same tendency. The sheriffs were under suspicion, and a long series of attempts to limit them began with the coroner and ended with the characteristically English semi-official justices of the peace.[2] There was also, and naturally, much development in the officials of central justice and administration. But in the localities there arose no hierarchy of officials, no bureaucracy. The increasing problems of government were not solved that way. The enormous extension of juries in Henry II.'s reign was fundamental in fixing the royal policy; perhaps the most notable thing in government which was taking place in England from the twelfth century to the end of the middle ages was that the king was getting his work done largely by the people, and that with practically no compensation. The striking illustrations of this are the king's use of the Commons in Parliament, and the juries. But important as these are, they give but a feeble notion of the burden of public work and responsibility which rested on the people; and this section, dealing with the king's power and policy and with general administration, seems the best place in which to attempt to indicate the *mass* of that work. The Chancery enrolments beginning with John's reign,[1] the plea rolls which began earlier, and Bracton's great work telling so much of early thirteenth-century judicial practice, make it possible for us to form some conception of the intimate and continuous political influences under which common men lived in the thirteenth century, and, apart from the study of individual institutions, to feel, almost from the point of view of the people themselves, something of the total burden of tasks and trusts which was descending upon them from central authority. This is not easy to do—to sense this burden apart from categories and forms. We talk of judicial-jury or frankpledge or assize-of-arms obligations, and the mind easily takes these and sets them apart as things well known and discounted. But the king was not thinking in these terms. Categories and forms were there, but they were different; the king was getting his work done, judicial or other, in the way that best suited him at the time and most swelled his revenue. The jury method passed untroubled back and forth over the yet dim boundary of a court of law. Courts of law were more and more the king's, and the stamp of king's business set a common mark on all things it touched. Separation between judicial and administrative functions was progressing very slowly, and most of what may be called local government, whether drawing its authority from the age-old local communities or from the king, was carried on under judicial forms.

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[1] See the excerpt from Robert of Hereford's chronicle in Stubbs, *Select Charters*, p. 95.

[2] See above, pp. 196–202.

In judicial process[2] (this is not limited here to what actually happened in the presence of a court of law) the people were much concerned in the steps which preceded or accompanied the appearance of the parties in court: the burden of suit of court in county, hundred, and manor have already been considered; also the matters of arrest and pursuit including the hue and cry with its wearisome and perilous obligation upon all over fifteen, of the large coroners' juries charging a homicide, appraising goods of the accused, determining deodands,[1] and the local knights upon whom was laid, sometimes alone, the responsibility of holding the assizes or gaol delivery; the local summoners were not officials and the uses of them were manifold, many involving a journey to a court in addition to the summons and much accurate formality in wording, time, etc.; those who were (often apparently perforce) sureties for others in the earlier steps, and also all the way through judicial process were very numerous; and all the *essoins*, *i.e.* excuses, with which procedure was cumbered involved *essoiners* who were not mere messengers of excuse, and who, non-officials as they were, must often carry out highly technical investigations. In the second place, people were used in all that was incidental to indictment or appeal in criminal and to the pleadings in civil suits: here were the suits of witnesses brought to establish a presumptive case, the men accompanying appellor and appellee to the judicial duel, the presenting juries including usually knights, freemen, and villeins, the bearers of the record of presentments—a message not to be intrusted to the sheriff, the electors of the grand-assize juries; and many more or less incidental uses of men, largely in the early steps of process and most of them juries for determining minor points arising in the course of the pleadings. In the matter of proof, or trial proper, there were still the compurgators, regular in some cases and in some courts for nearly all cases; there were still also the proof witnesses, including transaction witnesses, charter witnesses, and the suits of witnesses produced on both sides and examined by the court in some few questions of fact which had not yet passed to the jury; but of course most important here and for the whole of procedure were the juries: the trial juries in criminal cases after 1215 normally groups of forty-four men, largely a second job for the presenting juries; the grand-assize juries which must pass on the most solemn questions of best right to land or to patronage; the incessantly used juries in the four petty assizes every one of which must make a view of the property in question, a view often detailed and difficult, juries of whom unanimity was already required and obtained often by the use of additional men through the process of afforcing, juries subject to attaint and punishment by appeal to a new jury of twenty-four knights; and besides these established uses, the jury was already making its way through voluntary choice of the litigants into the criminal cases begun by appeal and into the forty to fifty civil actions then in use, several of which involved view; and there were juries, specially treated juries, in those Bills in Eyre which curiously foreshadowed the equitable jurisdiction of the Court of Chancery. Fourth, in final process, were often juries to make extents of lands or rents as basis of remittance or acknowledgment of one party to another, to survey questionable boundaries at the end of a writ-of-right case, juries to assess damages when such were awarded as a subsidiary remedy, and the endless juries for affeering (*i. e.* assessing) the amercements in the king's court and in the courts of county, *tourn*, and manor; and there were knights who bore the record from county courts to Westminster when a case was carried up through writ of false judgment.

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[1] See above, p. 313 and note 2.

[2] In this enumeration of the people's tasks some features of judicial process are mentioned which it has not been possible to discuss, which are appropriate only to detailed works on legal history; yet it is hoped that their general character is made sufficiently clear to serve the present purpose.

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[1] Things immediately instrumental in anyone's death (as an axe, a cart, a tree, etc.) were by an old legal notion regarded as forfeited to God; such things went to the king to be used supposedly for pious purposes. It was often difficult to determine just what things were deodand.

This has been merely to name the leading uses, or rather groups of uses, of the people in some way connected with legal procedure. There were something over eighty of such uses at this time, and two of them, summons and pledge, were employed in from fifty to sixty different ways. Taking England over, some of these, as suit of court, summons, pledge, essoin, assize juries, affeering juries, must have occurred thousands of times each year. The number of references to be found in the records is enormous.

It should be noted here that in some of these instances men were playing a part in procedure, *e. g.* pledges, essoiners, suit witnesses, some of the proof witnesses, compurgators, who appear to have done so more or less voluntarily. The ideas and methods of the time, perhaps a kind of social pressure—kinship, good neighborliness, the custom of the locality—drew them in. Any thing, however cumbrous, which involved people and not officials pleased the king. He preferred pledges to making good gaols and having good gaolers. But in most and the most important of these functions the people were acting under command. Much could be said of the responsibility and difficulty of many of these, among which the juries, getting their own information, with their frequent views, their judging of fact and judging of law in order to give the categorical answers usually required, and their not infrequent trips to London in units of twenty-four, are familiar but not exceptional. The obscurer groups, in many instances, did as much work and took as great risks. The king's justices were umpires, but the people had to play the game.

Largely outside the realm of the courts were the frequent extents, or surveys, on the manors made by means of manorial juries to verify the terms of the customary tenures, the duty of nominating or electing manorial officers resting upon the inhabitants of the manor, the obligation upon many of the middle and lower classes to purchase and possess armour under the Assize of Arms and the possible militia service implied, soon to be supplemented by watch and ward, and the duties of the *posse comitatus* resting upon all males over fifteen. The obligations which men bore as members of the local community, the vill, were many—the vill's representation on the presenting juries, at the eyre courts, and on coroners' juries, and its hue and cry obligations are always mentioned with those institutions; and in this connection we hear of a larger group with communal obligations—the "four neighboring vills"[1] which had many petty but burdensome things to do. Moreover, the parish was already appearing as a "unit of local obligation": upon the parishioners rested the responsibility for the upkeep of the church, providing ecclesiastical apparatus, auditing churchwardens' accounts, and levying an embryonic church rate—functions which on the continent rested mostly upon the incumbent.

Less familiar, but of the same general character as all the preceding, were the king's direct and personal uses of the people in getting special jobs done and his local interests safeguarded. These uses are most miscellaneous and dovetail endlessly, but may be roughly classified as follow: estimates and oversight connected with building and repairing the king's houses and castles, running all the way from extensive work on a whole building to a gate, a window, or a shelf; furnishing the greatest variety of data relating to land, custodies, and the rights to them or the services connected with them; oversight of transportation or estimating the cost of transportation: money, armour, prisoners, venison, lumber, most often the king's wine, and here and in some other cases including purchase or estimate of value; fixing the value of land, surveying it, laying out a highway, etc.; reckoning certain expenses of the king's domestic household, usually of a special kind borne by some individual and not provided in the regular way; estimating the value of agricultural equipment, crops, or live-stock; determining the king's forest boundaries and rights and many things incidental, as well as checking up on the doings of forest officials; special or temporary care of the king's horses and dogs and the purchase of horses for the king; oversight of equipment and supplies for the king's sailors and providing lumber for shipbuilding; estimating the cost of working land, and stocking it, also the amount of seed needed for it, and purchase of the seed; cost of provisioning castles and maintaining garrisons; having charge (usually for a short time) of all sorts of goods, from collected tax money to the property of suspected Jews; estimating the value of land in connection with agricultural equipment, cattle, etc.; assessment and collection of taxes; assessing damages and losses, usually those which the king for some reason felt obligated to make good; and, beyond these, miscellaneous employments which cannot be classified and which surpass in variety what the most lively imagination might picture as falling within a thirteenth-century king's interest. All of these uses of the people show a habit of mind, a method, of these powerful kings who could do business as they chose, a bent away from officialdom in local affairs. And all of this, in courts and out, marks the Plantagenet sovereign's view of his relation to the localities and what local government ought to be in the long period of decline of the old communal system.

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[1] Perhaps there was an original notion of the four points of the compass of the neighbourhood. The expression had a meaning when the duties arose in connection with a crime or other localised event; but in many cases apparently it was but a traditional way of expressing vill obligation. Sometimes the work was done by one vill and sometimes by four, but we know almost nothing of the ways in which such duties were regulated and enforced. In the boroughs the parishes or wards had corresponding duties. The vills were to "take charge of felons, to lead them to gaol and even to the gallows; to receive the head of a culprit who had been decapitated by summary justice; to hold and account to the king for deodands and the lands and chattels of felons; to watch any person who had fled to sanctuary, and to be present at his adjuration of the realm; to send for the coroner when a sudden death occurred; to guard the dead body until the coroner came, and to be present at the view and burial; to make good the loss incurred by merchants of the staple through the unlawful seizure of their goods; to repair hedges, bridges, dikes, and ditches; to appraise and take charge of wrecks on behalf of the king."—Gross, *Select Coroners' Rolls* (Introduction), pp. xxxix., xl.

No less varied than the subject matter of these inquiries and trusts is their degree of difficulty or responsibility. The use of local men is often merely to witness a thing that they may certify it if question arise later, or they may be called upon to state facts of memory or tradition when the alternative is their testimony or nothing. From these extremes of mechanical action by imperceptible degrees the cases vary to elaborate estimates, judgments, or difficult charges in which witnessing and memory are lacking and responsibility is large.

Viewed as a whole, these uses of the citizens in government, in courts of law and outside, present a burden which seems unbearable. There must have been ways of mitigating them, some devices of collaboration or of doing service by turns. But with whatever allowance, it must be concluded that unpaid-for work and risks for the state made one of the two or three leading facts and shaping influences in the lives of, say, the hundred thousand knights and freeholders or indeed also in those of the possible three hundred thousand peasants of that time. As compared with the direct and final use of officials there was involved a vast amount of trouble, from planning and instruction on the part of the king or his ministers to the endless summonses, selections, and assemblings in the localities. It is a great wonder that the king in the interest of what he thought efficiency and personal profit believed it was worth while. It is a greater wonder and a notable commentary upon medieval Englishmen if it really was. But to look at another side, it seems pretty clear that, for better or for worse, the lives, the limbs, the property, the prosperity or adversity, the happiness or sorrow of the bulk of the English population in three-quarters of the crises of their lives depended upon the knowledge, discretion, good will, or judgment of their neighbours. This was self-government; but self-government not in spite of the king but at the king's command.

There is not space here to follow the detail of this local work in the centuries following the thirteenth; and indeed this feature of English history has not yet been sufficiently studied in the late middle ages to make this possible. But there is much to indicate that though forms and methods changed and some of the old local institutions, especially the communal and manor courts, were passing away, yet the fundamental principle that the people must bear the chief burden of local government was not changed. Well before the end of the middle ages there were signs that the old ecclesiastical unit, the parish, was receiving an extension of duties and powers which bade fair to make it a notable feature in local government. Religious houses had succeeded in pretty well swallowing up the permanent endowments which supported the parish churches—lands and tithes. As a result churches must be closed and priests dispensed with or rates must be assessed on the parishioners, rates heavy and regular, quite different from the slight and occasional church rate which may be glimpsed in the thirteenth century. Assemblies of parishioners met in the "vestries" of the churches and were presided over by priest or churchwardens. Their main business was levying the rates, and such assemblies came to be known about the time of the Reformation as Vestries, though some of them were called, and continued to be called, town-meetings.[1] A tax-levying power was something that might easily extend itself, rates begat rates, and erelong the Vestries were taxing the parishioners for other than church purposes, and the parish was becoming a dual personality—it was the parish and the civil parish. The Vestry became a body that had many things to do, and was the only authority, except Parliament, which could levy a tax. The flowering of the civil parish belongs to the sixteenth and seventeenth centuries, but its roots were deep in the middle ages. It was taking up into itself not a few of the functions and officials of older decadent local institutions: from the old police unit, the vill, from the hundred, from the manor with its court leet, court baron, and court customary.[2] The civil parish was like the legatee of several impoverished estates, but who in sum total managed to come into a humble yet substantial property. It was a queer jumble of the ecclesiastical, economic, and governmental, of things new and old; its officials reflected all times and a most checkered history; there were things about the civil parish as new as Elizabethan statutes and others older than Alfred. The chief importance of its mention here is, however, the fact that it strikingly embodies in the later time the principle of unpaid public service resting upon the humblest of the people. The parish

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[1] On the relation of the English parish and the New England town-meeting, see W. and N., Problem VI. The quest for democratic origins has shifted since we no longer assume an immemorial town-meeting going back to the German forests, and we place our feet upon very solid ground when we begin to talk about the sixteenth-century civil parish.

[2] See above, pp. 109, 110, 182–195.

> as an administrative unit was regarded by no one as an organ of autonomous self-government. It was, if we may coin a new phrase, an organ of local obligation—a many-sided instrument by which the national government and the established church sought to arrange for the due performance of such collective regulations and common services as were deemed necessary to the welfare of the state. And they did this, be it noted, not by the creation of a salaried hierarchy of government officials, working under the control of the king, but by the allocation of unpaid offices and burdensome duties among the ordinary citizens serving more or less in turn; and . . . by the strict subordination of these amateur parish officers to a superior organ of local self-government, the justices of the peace of the county or municipal corporation.[1]

The chief offices of the parish, such as those of churchwarden, constable, surveyor of the highways, and overseer of the poor, though they

> differed widely in their origin, in their antiquity, and in their scope, had many attributes in common. They all rested upon a different basis from the modern conception of a public official. They were unpaid. Service in them was compulsory, with certain legal exemptions, upon all who belonged to the parish.[2]

[1] Webb, *English Local Government from the Revolution to the Municipal Corporations Act: the Parish and the County*, pp. 40, 41. While Webb thus emphasises what is undoubtedly the most significant feature of this local government, it was not within the purpose or scope of his investigation to relate it to the history of earlier institutions or the tradition of royal policy with respect to local affairs.

[2] *Ibid.*, p. 15.

In the matter of local officials something has been said of those of the county; and the most important of these, justices of the peace and sheriffs, served practically gratis. But the line between official and non-official is often hard to find in English history. When individuals could buy themselves free from public burdens, the services which we find mentioned seem both official and non-official; and such burdens and the attempts to escape from them appear to have been as numerous in the fourteenth or fifteenth century as in the thirteenth: petitions to the king during the year 1384 reveal over thirty jobs or offices from which men were buying themselves free. Surely it is a thing to be remarked in the history of a country that it was so administered that people, in the case of so many offices, far from wishing to buy themselves in, were eager to buy themselves out. And the question occurs, how far and why has the government of English-speaking peoples remained non-professional—essentially amateur—and what is the value of such government. Without presuming to answer so broad a question, the opinion may yet be ventured that English kings, working in what they believed to be their own personal interest, so used the English people in government, laid upon them for centuries such burdens and responsibilities, that they went far towards creating the Englishman's governmental sense and competence. Such varied and long-continued service—service unpaid and occasional and hence unprofessional—must, it seems, have brought about special aptitudes, ways of reacting to conditions or problems, the competence, method, atmosphere which determine the working of any political form. If through England largely self-government has come into the world, here may be something of value in understanding its beginning; and doubtless we should speak less of a native genius for self-government and more of the long and hard course of training through which the English people, much of the time unwilling pupils, passed. When Charles I., on the scaffold, said,

> For the people . . . their liberty and freedom consists in having government. . . . It is not in having a share in government; that is nothing appertaining to them,

it was a long line of his own predecessors that had done much to make the statement untenable even in the limited sense in which Charles meant it.

SECTION III

PARLIAMENT

1. **Origin of the House of Lords.**—In the thirteenth century a fundamental change was beginning in the larger, summoned meeting of the king's court, the great council.[1] When the change was completed, that body had become the House of Lords. At the same time there were being added to it certain new elements which were finally to form the House of Commons. These were the two great processes in the making of Parliament, with the first of which we are here concerned. In dealing with this subject, it is especially necessary to rid the mind of modern preconceptions; the very word Parliament produces involuntary mental images of the fully developed institution that are certain to interfere with the understanding of its beginnings.[2] One must be willing to take one step at a time and to be mindful that the great institutional creations of medieval England were not the products of purposeful building for the future, but that

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[1] See above, pp. 116–118.

[2] "When states are departed from their original Constitution, and that original by tract of time worn out of Memory; the succeeding Ages viewing what is past by the present, conceive the former to have been like to that they live in; and framing thereupon erroneous propositions, do likewise make thereon erroneous Inferences and Conclusions." Cited from Sir Henry Spelman's *Of Parliaments* by Professor McIlwain in his *High Court of Parliament*, p. 166. The latter comments: "In no nation's history has this been more true than in English history, and in no part of English history more than in the history of Parliament. The hardest thing for a historian of institutions to do, and the thing he oftenest fails to do, is 'to think away distinctions which seem to us as clear as sunshine'; and yet, as Professor Maitland says, 'this we must do, not in a haphazard fashion, but of set purpose, knowing what we are doing.'"

they grew slowly through the adaptation of means to immediate ends, that there was a careful preservation of the valuable things of the past and a spirit of caution and compromise which allowed to each of several contending interests its due consideration, and that physical environment and many things which can be ascribed to nothing but pure chance played important parts.

It has been shown that the great council was mainly feudal; but unlike the feudal courts of other lords it might at times contain men who were not tenants-in-chief, for the king was more than suzerain. This summoning of others was particularly marked in the reign of Henry II., a king whose rule was so vigorous and all-embracing that he needed a variety of counsel. From the beginning, the will of the king was an element in determining his court's make-up. The class of king's vassals in England was very diverse within itself; while it contained all of the very great landholders, there were also within it many small holders. Probably from the time of the Conqueror, there was some recognised cleavage between those who held much land of the king and those who held little. In the reign of Henry I., the great tenants-in-chief, who led their own vassals to the feudal host, received a special form of summons to the host, and there was probably a corresponding difference in the form of summons to court service; at any rate there was such a difference in Henry II.'s reign. Hence arose the distinctions between the *major barons* and the *minor barons*, of whom we begin to hear in the twelfth century.[1]

Attendance in the king's court was not regarded as a privilege, but as a burden in most instances. This was especially true of the minor barons who were less able to bear the expense and who found little at the court to profit or attract them. They were coming to regard military and court service, their strictly feudal duties, as burdensome, and were giving more attention to their lands with a view to making them financially profitable; their interests were becoming localized.[1] The different methods of summoning major and minor barons received formal recognition in article fourteen of Magna Carta, which was undoubtedly the work of the barons whose interests it favoured.[2] An individual summons was to be sent to the greater barons, while to all the lesser tenants-in-chief was sent a general summons through the sheriffs. This latter was generally regarded as permission to stay away, which was what the minor barons wished. The make-up of the great council came to be quite dependent upon the will of the sovereign and tenancy-in-chief less a basis for attendance, though it did not disappear for centuries; in other words, peerage by writ of summons was taking the place of the feudal principle in determining the composition of the king's court.

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[1] *Baron* was not a title of dignity, but a term applying to all who held land of the king on the basis of military service. Only the major barons held *baronies* (a barony normally equalled 13½ knight's fees). On the original meaning of baron, see Maitland, *C. H. E.*, p. 65. Finally the word became solely applied to major barons; but vagueness in its use lasted long. "The *barones* of one clause of the great charter seem to be the *barones majores* of another." See also J. H. Round, "*Barons" and "Knights" in the Great Charter* in Magna Carta Commemoration Essays.

The question naturally arises whether there was in the thirteenth century a distinct class of major barons who might always expect the special summons or whether receipt of the summons determined membership in the class. As in most medieval institutions, one finds here vagueness and irregularity, where he might expect adherence to a fixed principle. In Henry III.'s reign, there were certainly many barons so great and powerful that they would always expect or demand a summons. In the meeting of 1255, for instance, complaint was made that all had not been summoned who, by the provision of the Charter, should have been. On the other hand, the special summons made its recipient a major baron if he had not been one before.[1] But attendance was felt to be a burden except in cases of special interest, as when an unusual aid was demanded; and there were instances in the thirteenth century when the lesser tenants-in-chief attended for such reasons; certainly they always *could* attend.[2] It was doubtless for this reason that article fourteen of the Charter provided for a statement in the summons of the business to be transacted, that the time and place of meeting be clearly indicated, and that the summons be sent at least forty days in advance. The personnel of successive meetings varied much; for the distinction between major and minor barons was not sharply drawn, and there was a wide province between the very large and the very small holders in which the king's will acted freely. This remained the condition until well into the reign of Edward III.; there could be no change until attendance upon a central assembly had become a thing to be desired.[3] The capriciousness of the king's summonses shows that no new principle that would make a regular and self-conscious assembly was being introduced.

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[1] See below, pp. 347–350.

[2] But it is to be doubted that they had in mind the formulation of a general rule for all meetings of the great council; strictly interpreted the rule is made to apply only to meetings summoned for the purpose of granting an aid or a scutage.

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[1] "Thus we seem to be involved in a circle—who is entitled to the special summons? He who holds a barony. But what estate is a barony? One which entitles its owner to a special summons."—Maitland, *C. H. E.*, p. 81. The practice of sending the general summons to minor barons through the sheriffs may have been kept up during the reign of Henry III. But it was soon abandoned because these men were, with the rest of the shire, represented through the now regularly elected knights. There was now no distinction in political status between knights who held directly of the king and knights who held of mesne lords.

[2] It should be remembered also that when the feudal host was in arms it could act as a great council; knight service and court service were what vassals owed their lord and there was no reason why the two could not be combined upon a single occasion. On such occasions many minor tenants-in-chief would be likely to be present.

[3] Maitland has commented instructively upon the barons' "right" to attend the "parliament" of 1305: "We must put duty in the first line, right in the second. We have learnt to do this when discussing the constitution of those county courts which send knights to the house of commons; must we not also do it when we are discussing the constitution of the house of lords and of the council? In 1305 the baron who had come from Yorkshire or Devonshire, had been compelled to stay three weeks in London at his own cost, for he was paid no wages. Did he very much want to spend another three weeks there hearing dreary petitions concerning the woes of the Scots and Gascons? At a later time a desire for political power or social pre-eminence will make the English baron eager to insist on his right to a writ of summons, eager to take a part, however subordinate, in all that is done by the house of lords. But in Edward I.'s day the baronage is hardly as yet a well-defined body, and it may be that there are many men who, unable to foresee that their 'blood' is being

The change began as a result of Edward III.'s continuous demands for money and the increasing business brought before the barons; they were vitally concerned in the money grants and in some of the other business, and the growing activity and responsibility of the assembly gradually begot ideas of political power and honour. Late in Edward II.'s reign, the barons had first spoken of themselves as *peers of the realm* and this is perhaps the first indication that honour was being attached to the old burden of suit of court.[1] If a baron received one summons, he began to expect another at the next meeting. He by no means always got it, but the tendency of the fourteenth century was away from capricious summonses. And if he continued to receive summonses throughout his life, it raised the presumption that, after his death, his heir would receive them, for it was an age when all valuable rights were likely to become hereditary.[2] But the conditions of Edward III.'s reign did not last; any notions of political prestige connected with summons to a great council were not deep-seated, and throughout the fifteenth century the old feeling that attendance was a burden was often uppermost. Yet the fuller meeting of the old king's court was being metamorphosed into an assembly which peers attended on the basis of a hereditary dignity without reference to tenure.[3] The change was not

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'ennobled' for ever and ever, are not best pleased when they receive a writ which tells them that, leaving their homes and affairs, they must journey and labour in the king's service, and all this at their own cost. Thus for many years one great constitutional question can remain in suspense. It is not raised, no one wishes to raise it. So long as the king does not impose taxes or issue statutes without the consent of the baronage, the baron hopes that the king will mind his own business (and it is his business to govern the realm) and allow other folk to mind theirs."—Introduction to *Memoranda de Parliamento*, pp. lxxxvi., lxxxvii.

[1] Pike, *Constitutional History of the House of Lords*, p. 109.

[2] This was not regarded as a binding rule at any time in the middle ages. See Pollard, *Evolution of Parliament*, p. 99.

[3] When in later times baronies came to be alienated, the question arose whether the right to sit in the House of Lords went with the land to the

complete in the reign of Richard II., for relics of the old feudal, tenurial basis lasted a surprisingly long time; but a comparatively small and quite compact body of hereditary peers had taken shape.

While it is true that fourteenth-century peers attended what we may venture to call the House of Lords (it was first so called in the reign of Henry VIII.) because they received writs of summons from the king, it should be remembered that they were barons by tenure already. The writs did not make them barons; to use the old terminology, they made them major barons, or, in language more suited to the time, the writs did not determine who should be barons—which was still a matter of tenure—but which of the barons should be *peers of the realm.* As all the peers were barons, it was natural that the inheritance of the dignity of a peer should be regulated by the rules which applied to the inheritance of fiefs. Hence in default of male heirs, the dignity might pass, like the barony, to an heiress. No peeress was ever summoned to the House of Lords,[1] but she might confer upon her husband a presumptive right to the king's writ of summons. In the later middle ages, there were many instances in which the husbands of such heiresses were summoned to Parliament as peers.

A change took place in the fifteenth century which eventually brought to an end this method of transmitting a peer's dignity and which was the last important step

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new family. It was decided that it remained in the old family notwithstanding the alienation.

[1] Perhaps the nearest approach to the summons of a woman to Parliament was the case of "four abbesses who in 1306 were cited to a great council held to grant an aid on the knighting of the Prince of Wales."—Maitland, *C. H. E.*, p. 168. But a chronicler in 1265, writing of the parliament held just after the battle of Evesham, states: "At the feast of the Exaltation of the Holy Cross a great parliament was held at Winchester, to which were called all the magnates of the land, and all the wives of the earls, barons, and knights killed in battle or remaining captives in prison." *Annales Monastici*, ii., 366. The Waverley Chronicle, in which this statement is made, was contemporaneous from 1219 to 1266 and is regarded as one of the chief authorities for Henry III.'s reign, especially for the time of the battle of Evesham. Lacking the summoning writs and like statements in other chronicles, we must probably always remain in doubt about the Waverley Chronicler's accuracy on this point.

in the structure of the modern House of Lords. It had become the practice, by the end of the fourteenth century, to create titles of dignity by letters patent; these were open letters which differed from charters only in their less formal attestation. The title of earl had been conferred in this way since Stephen's reign, and the new titles of duke and marquess were so conferred in the late fourteenth century, and viscount in the fifteenth.[1] In the letter creating the title, it was possible to regulate the succession of the title. In 1387, was the first and, for a long time, the only instance of the creation of a baron by letter patent; this baron was also declared by the letter—and it was the object of his being made baron—an hereditary lord of Parliament. Such creations became common in the reign of Henry VI. It was a time of bitter strife among the nobility, and it was often found useful for the party for the moment in power to be able to raise men to the peerage who did not happen to be barons. By the end of the century, it had become the normal method of creating peers. The king could regulate the succession in any way he chose; but in practice, the title was made to pass to male heirs only, and that under the principle of primogeniture. The advantages of the new system were obvious: heiresses could no longer confer the dignity of a peer upon their husbands and thus carry it into new families which might not be agreeable to the king or the existing peerage, and the king was now able not only to make a baron a peer, but any one. It seems clear, however, that these advantages were not seen at first; personal and immediate motives ruled, especially during Henry VI.'s reign when the letters patent were, so to speak, becoming the fashion. A gradual recognition of the broader advantages kept them in fashion.[1] It is obvious that through the use of letters patent the term baron would gradually lose all its old feudal meaning.[2]

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[1] The first dukedom was created in 1337 by Edward III. for his oldest son. His other sons were later made dukes. In 1397 Richard II. conferred the first dukedom outside the royal family. He also made the first marquess. These titles were adopted from the continent; they gave social precedence, but had no legal standing. They "implied no territorial power or jurisdiction over the place whence the title was derived. Even the old title of earl, though always taken from a county or county town, had long ceased to imply anything of the sort."—Maitland, *C. H. E.*, 166, 167. The titles in order of importance were duke, marquess, earl, viscount.

Here a query necessarily arises concerning the spiritual lords. No principles of inheritance could apply to them. How were they faring during these changes? Bishops and abbots had been summoned to the king's feudal court by virtue of the baronies they held, that is, because they were tenants-in-chief. They were major barons in the twelfth-century sense; and they were wise and influential, and hence important as counsellors. Though the king's will continued to determine who were to be major barons, the bishops received the writs of summons with practically unbroken uniformity; their importance, tenurially and otherwise, placed them beyond question. But with the abbots and priors who were barons, the king exercised the same capriciousness as with the lay barons of corresponding grade. Also, as with the lay barons, the capriciousness decreased under Edward III.; certain abbots and most priors were scarcely ever summoned. The abbots as a class were disinclined to attend.[3]

When the barons began to call themselves peers, the prelates were considered as fully peers as the lay barons, for the technical basis of their attendance was the same. This continued to be the case until well along in the fifteenth century. But a different conception finally arose as a result of the clergy's inability to share fully the judicial work of the Lords.[1] They could not be present when judgment was passed involving loss of life or limb, for the canons forbade it; and they held aloof from their right to be tried by their peers through their strict adherence to the principle that no lay court could try them.[2] Hence the idea gradually took shape that they could not be regarded as peers, while they were certainly lords of Parliament. After the dissolution of the monasteries in Henry VIII.'s reign the bishops were the only prelates in the House of Lords, and in 1692 a formal declaration was made by that House that bishops were not peers, but only lords of Parliament. The fifteenth-century change from writs of summons to letters patent could have no effect upon the prelates, for no letters patent could create them; their right to attend Parliament always drew its sanction from their ancient baronies.

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[1] The Crown actually used its power of creating peers to overcome an adverse majority in the House of Lords in 1711. The Tory ministers who negotiated the Treaty of Utrecht did not control the House, and Queen Anne created twelve peers (calling up three eldest sons and creating nine new peerages) to give them a majority. In 1832 a threat of creation served to pass the Reform Bill through the Lords, and the same was true in the case of the Parliament Bill of 1911.

[2] On the subject of the new titles of dignity and the letters patent, see Stubbs, *Constitutional History*, § 428.

[3] Under Edward I. there were seventy-two abbots that at one time or another attended his assemblies—sixty-seven in the "Model Parliament." This number fell to twenty-seven under Edward III., and this remained the number until the dissolution of the monasteries. See below, pp. 345, 370–373, 376, note 1.

In view of later history we are especially interested in the meetings of barons or peers which were summoned at the same time as were the representatives of counties and boroughs and we think of these lords and commons as the later recognised "houses" of Parliament, and almost perforce speak of them as such. But a contemporary could not think of a "house" of lords when the lords so often met as a great council by themselves.[3] Especially in the fifteenth century when there were fewer Parliaments than in the century before were such great councils frequent. They were probably often regarded as an increase or afforcing of the king's ordinary or perpetual Council—the difference in numbers was not very great—and in these two bodies the fifteenth century nobility sought to control the king.[4]

The number of lay lords summoned during the fourteenth and fifteenth centuries averaged from forty to fifty or a little over; the spiritual lords numbered a few more. But often, especially during the Wars of the Roses, the number of lay members fell considerably below this, leaving the prelates in a majority.[1] The dissolution of the monasteries in the next century gave a permanent majority to the lay members.

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[1] See above, pp. 231, 232.

[2] "It is a very doubtful question what would now happen if a bishop committed felony or treason."—Maitland, *C. H. E.*, p. 171.

[3] See below, p. 372 and note 1.

[4] See above, p. 207.

2. **Why there was a Middle Class in England. Representation and Popular Election.**—Having seen the structural transformation of the great council into the House of Lords, we begin the study of the House of Commons by enquiring into the conditions which made possible the adding of new elements to the changing central assembly. The addition was made in the thirteenth century and the new elements represented a great middle class. What was this middle class? It will be remembered that at the time of the Norman Conquest English society was in a peculiarly unsettled condition. Many freemen were being depressed in status and were taking on characteristics of servility. With some the change had gone so far that they might well be ranked with the servile classes; others were in a doubtful, intermediate position. Unquestionably forces were at work which looked toward that complete disintegration of the non-noble, free class which was taking place upon the continent. But the important point to note here is that the process had not been completed in England and that the Norman Conquest was reached with a considerable body of non-noble freemen, a true middle class, still existent. The immediate effect of Norman clear thinking and vigorous action upon the broad Anglo-Saxon class which lay between the manifestly servile and the noble was to push many individuals farther down than they had been before, and, on the other hand, to render the

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[1] The number of lay lords was never over fifty under Henry IV., and only once reached forty under Henry V. Under Henry VI. the minimum was twenty-three and the maximum fifty-five, and in Edward IV.'s reign the maximum was fifty. In the fifteenth century the number of abbots summoned was down to twenty-seven, but with the two archbishops and the twenty-eight bishops there were fifty-seven spiritual lords when all attended.

free status of the remainder more distinct. Surviving the Conquest, and, in a manner, created by it, was a class of non-noble freemen.[1]

A second source of the later middle class lay in the lower orders of the nobility. These consisted of the numerous small tenants-in-chief, the so-called minor barons, and the small sub-tenants of the king's greater vassals, or, where the feudal hierarchy extended so far, the tenants of sub-tenants. Any of these might hold only a single knight's fee, or perhaps not even the land requisite to a knight and be reckoned as esquires. As the twelfth century progressed, a split appeared in the nobility; the interests of these smaller holders were becoming differentiated from those of the greater barons. The strong Norman and Angevin kings, who made wars to cease and kept order in the country, were cutting the lesser nobles off from their feudal activities. Where there was subinfeudation and knight service was owed to others than the king, the contract was as clearly present as between the king and his knights; but English kings were soon able to bring it to pass that no man could use his knights in a private quarrel. "The only quarrel in which anyone is bound to fight is the king's quarrel." And the acceptance of scutage from the knights was exempting them from service in the king's foreign wars. Fighting with their neighbours was the normal occupation of small feudatories; if they could not do this, there was nothing left but to stay at home and attend to their estates. The possibility of increased revenue from their estates began to suggest itself; the financial side of their position absorbed more of their attention; they were soon on the way to landlordism. This change brought them into closer contact with the class next below them, and their interest became more identified with their localities. There thus began, as early as the twelfth century, the process by which the lower orders of the nobility in England were dissociated from the higher and approached the non-noble freemen.

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[1] The free classes outside the boroughs are particularly in mind here, for it was in that part of the population that the principles of representation and election, important in the origin of the House of Commons, are first seen. But it should be remembered that the burgesses were largely of free origin, and that burgage tenure was a variety of free socage, the characteristic tenure of the non-noble free classes. For an account of class conditions in the twelfth century, see above, Part II., § I.

Besides these results of their stern rule, there must be noted the effect upon the whole nobility of what may possibly be termed a policy of the post-Conquest kings. They were able to keep any class of nobles from gaining such immunities or privileges as to mark it off in the eyes of the law from the other freemen.

> Our law hardly knows anything of a noble or of a gentle class; all free men are in the main equal before the law. For a moment this may seem strange. A conquered country is hardly the place in which we should look for an equality, which, having regard to other lands, we must call exceptional. Yet in truth it is the result of the Conquest, though a result that was slowly evolved.

With the strange complex of classes left from Anglo-Saxon times, a strong king could do what he pleased.

> . . . he can make his favour the measure of nobility; they are noble whom he treats as such. And he does not choose that there shall be much nobility. Gradually a small noble class is formed, an estate of temporal lords, of earls and barons. The principles which hold it together are far rather land tenure and the king's will than the transmission of noble blood. Its members have political privileges which are the counterpart of political duties; the king consults them, and is in some sort bound to consult them, and they are bound to attend his summons and give him counsel. They have hardly any other privileges. During the baron's life his children have no privileges; on his death only the new baron becomes noble.[1]

But this is using the word noble in a narrow and English sense. The formation of this new and limited nobility will be recognized as the evolution of the House of Lords. It was a nobility that did not tend to increase, for the title went only with the tenure and the tenure was becoming strictly primogenitary.

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[1] P. and M., i., 408, 409.

The early prevalence of the primogenitary principle was also a result of the Norman Conquest. Primogeniture originated in feudalism. The overlord wished a certain and undivided source to which he might look for the service owed by the fief; the vassal would naturally divide his holding equally among his sons. Owing to this clash of interests, the growth of primogeniture was slow and was not completely established in Normandy at the time of the Conquest. The Norman kings of England had far more vassals than any other English overlord and were therefore more interested in the enforcement of the principle. They were strong enough to enforce it, and were strong enough not to be afraid to enforce it, that is, they had no vassals so powerful that they were tempted to favour some principle of partition in order to weaken them. Thus England got in advance of the other countries of western Europe in the adoption of primogeniture as the rule of succession in land law[1]; and the younger sons of barons lacked both the baronial tenure and the baronial title. They went to swell the class of lower nobility, which in England is properly termed *gentry*, a word which indicates nobility. For the gentry were of noble blood and performed only honourable services for their lords. In any country but England, they would have been reckoned every whit as noble as the greatest barons. But the strong kings in England had formed at the top of the general body of nobles a select number, who, being the only ones in possession of political and legal privileges, came finally to be reckoned the only nobles. Thus the gentry were distinguished from the non-noble freemen only by their noble blood, which carried with it the social privilege of wearing coat-armour, a practice which arose in the twelfth century.[1]

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[1] Like some other features of feudal tenure, primogeniture began to affect the freehold tenures. "It belongs in origin to a military system; slowly it spread from the military tenants to the socagers, it ceased to be the mark of a class, it became common law."—Maitland, *C. H. E.*, p. 157.

The characteristic member of the class of gentry was the knight. But the younger sons of a knight might never attain to knighthood either in tenure or title. Title is mentioned, for there were knights—often those knighted on the field of battle—who were not holders of the knight's fee; on the other hand, there were those who possessed knight's fees who had never been dubbed knights. The divorce between tenure and status[2] showed itself everywhere, and intermarriage might easily occur between gentle and simple; notwithstanding the use of coat-armour the line between the gentry and the non-noble freemen was often blurred, and there was a sharper line of demarcation between the greater and lesser nobles. Upon the continent, there was a great gulf between the pettiest noble and the class below; in England, there was a narrower chasm at this point with many means of crossing.

The sources of a substantial middle class in England (without taking into account the borough population) may now be summarised: a non-noble, free class survived the Anglo-Saxon period; the Conquest resulted in making the status of a portion of that class more distinctly free; there were many small nobles after the Conquest; the masterful post-Conquest sovereigns deprived these nobles of their important feudal traits, made them landlords in close touch with their localities and the class below; royalty also allowed no legal advantages to the nobles as a whole, but made a small class of hereditary counsellors a nobility in a special sense, and finally the only nobility; the gentry, thus lacking the name and distinguishing marks of a nobility, more readily approached local interests and the class of freeholders, and the movement was further aided by the characteristic English breach between tenure and status and the early triumph of primogeniture.

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[1] It must not be supposed, of course, that the kings contributed to this change with the conscious intent of fashioning a unique nobility in England; they acted merely as it suited their purposes to deal from time to time with this important part of their population. The thing was done before it was understood what was done.

[2] See above, p. 95.

In the second half of the twelfth century, the local activity of knights and freeholders in judicial and revenue matters strikingly illustrates the common interests of the two classes and probably itself contributed to their approach. In it lay the origin of the machinery which later suggested the calling of local representatives to the centre. With its consideration, we take up the second part of the theme; having noted the conditions which made a true middle class, we next consider the line of development which led to its representation in a central assembly. When Henry II. incorporated the sworn inquest in the procedure of the royal courts and outlined the work of a presenting jury, he furnished an appropriate sphere of activity for a middle class, a class acquainted with, and interested in, the affairs of the locality.[1] The sources leave one in no doubt about the people employed upon these early juries; they nearly always specify knights or free and lawful men. Towards the end of the century, the language often indicates that knights were preferred. These men were regarded as representing the knowledge and opinion of their neighbourhood; indeed, their representative character when they acted in these capacities was always marked.[2]

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[1] See above, pp. 156–158.

[2] "The sworn inquest seed found a favourable soil in England. It was sown in a country where there was a fairly large class of men which was at the same time, *responsible*, *well-informed*, and *honest*. The three qualities of responsibility, informedness, and honesty were perhaps as frequent in isolation on the Continent as in England. Be that as it may, it was the combination that was needed. A nobility, while certainly responsible and sometimes truth-telling, would not have a wide range of information on local affairs. A servile peasantry, while as honest as the nobles and well informed on the more local and petty affairs, would lack the goods and chattels on the basis of which a man could be conveniently held answerable for perjury. In men between nobles and serfs, the three qualities were more often combined. And England, in the centuries following the Norman Conquest, had more such men. England had a middle class."—W. and N., p. 36.

But the sworn inquest in its non-judicial use also continued, and was receiving a great extension about the end of the twelfth century. In the Assize of Arms, 1181, a jury of "lawful knights or other free and lawful men" were to assess their neighbours' wealth with a view to determining their proper military equipment.[1] This was in principle the same thing as to assess them for taxation. By the Ordinance of the Saladin Tithe,[2] 1188, the same method of assessment was to be used when a man was suspected of having paid less than he ought. In this instance, it was in connection with a true tax; and from this time, assessing juries were increasingly employed for the new personal property taxes. The itinerant justices' commission of 1194[3] shows the great variety of the information elicited from the knights and lawful men of the hundreds, much of it of a non-judicial character. In this same document, is the first official mention of coroners, who had been in existence since some time in the reign of Henry II. The coroner was then in the first stage of his development, a minor local justice who disposed of many small criminal cases and held preliminary hearings on more important ones preparatory to the visitation of the justices.[4] The coroners were regularly drawn from the class of knights. Thus there is much evidence that, if the knights had withdrawn from the camp and the court, they were finding plenty to do at home, and that the king regarded them and the class next below them as most useful in developing his court system, his revenue, and the general efficiency of his local control. Indeed as soon as the enrolled royal letters (the enrolment began early in John's reign) lift the veil on the detail of local administration, one marvels at the variety of information and service which the king was getting from the people. In his own interest he was making the people assume burdens and responsibilities without number. It was the English method.[1]

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[1] A. and S., p. 24; W. and N., pp. 90, 91.

[2] *Ibid.*, p. 28; pp. 91, 92.

[3] *Ibid.*, pp. 29–33; pp. 92, 93.

[4] See above, pp. 196–198.

In these dealings with the middle class, the kings were developing little by little a representative machinery and were certainly becoming conscious of it as such. Something of the representative idea is present in almost any kind of government, and it is useless to seek the origin of so general a principle. But there was a gathering of things more specific along this line in England: the tithingman represented the tithing, the lord or steward represented the manor in the local courts or when they could not the reeve and four men did, and every kind of jury represented its neighbourhood—it was the neighbourhood's knowledge or opinion or both that the juries furnished. While there is much of the principle of representation in medieval church polity, yet in England its rise and gradual working out to a conscious principle in government lie quite clearly outside the church, and nothing contributed so much to its growth as the phenomenal use of juries of all kinds from the reign of Henry II.[2] Popular election is not a necessary accompaniment of representation, and surely did not accompany it at this time. The representative juries were used by the king, and their choice by a royal officer would, in most cases, in no way incapacitate them for uttering the knowledge or opinion of their neighbourhood. For it must be clearly understood that for centuries after this there was no thought of representation or popular election as governmental methods to be used by the people for their purposes in government. The whole early development of popular election in England was by the king and to serve his interests.

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[1] "Norman and Plantagenet rulers were learning much about local institutions and conditions—about hundred and shire courts, about tithing and frankpledge, about the boroughs, about freeholders and knights. They saw always more work to do, more information to be sought, new ways to develop their courts, to swell their revenue, to keep the country in peace. The work was so varied that all sorts of men, official and unofficial, might be employed. Some of it, indeed, could be better done by unofficial means; there were temporary and isolated jobs in plenty. And so in this turbulent time, when the crash of the Conquest had broken barriers and opened ways and England was making ready for her next great reach forward in civilization, these new relations between center and locality were big with possibilities. Knight and freeholder—the stuff out of which the House of Commons was made—had entered upon their apprenticeship in public service; and many principles and devices were being hammered out in the daily practice of local administration which had an unguessed future before them in the broader sphere of national polity."—W. and N., pp. 74, 75.

[2] Yet its presence in the church surely favoured its growth; the king's great advisers and administrators were churchmen. Perhaps the earliest clear expression of the representative principle in connection with the royal administration in England was when Henry II. summoned the prior and "five or more of the more discreet and wiser" monks from each of twelve vacant abbeys to meet with him for the purpose of electing abbots, and instructed these representatives to bring with them "letters of the con-

Elections by groups of people were probably known to the Anglo-Saxons—the manorial reeves were chosen by the villagers, no one knows how far back, and as soon as there were tithingmen they were probably elected by their tithings. But the line of development which led to elections to Parliament, to election and representation as a notable feature of government, began with Henry II. He was exalting the jury and he was suspicious of the sheriff. Juries dealing with extremely important matters, matters touching property and permanent rights, might not safely be left to the direct and uncontrolled choice of

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vent to the effect that the others who remained at home would regard as valid whatever he [the prior] and those who came with him might do." See W. and N., pp. 89, 90. But the whole local administration, especially where the king touched it, was becoming shot through with the representative method. Indeed there could be no wide use of the people in government in such a country as England without representation, and the Plantagenet kings were determined to use the people widely. See above, Part III., § II., 4. See E. Barker, *The Dominican Order and Convocation*, for an attempt to prove that Parliament derived its representative principle from the orders of Friars. Professor G. B. Adams has this to say of the origin of representation: "Scholars have not yet come to an agreement among themselves as to the source from which the idea embodied in the representative system, as we understand it, was derived. It seems altogether likely that the final decision will be that the idea was derived from one source and the institutional forms, through which it was given expression in the constitution of the state, from another. At any rate it seems certain that the representative idea is first to be found expressed, in language which conveys something like the modern meaning, in documents relating to the synods and councils of the church. On the other hand it is equally clear that the preliminary, formal steps by which nonfeudal representatives were introduced into the great council were taken entirely free from influence of the church."—*Constitutional History of England*, p. 173.

the sheriff. Such were the grand-assize juries, juries which determined in perpetuity between litigants the better right to land.[1] Apparently from the start the choice of this jury was removed one step from the sheriff: four knights, undoubtedly named by the sheriff, chose twelve knights, usually including themselves.[2] This was a momentous beginning. In those great general *iters* which were beginning late in the twelfth century, the hundred juries often had to give information upon revenue and general administrative matters which would closely touch the sheriff's work. Note the way in which such juries were to be chosen for the great *iter* of 1194:

> In the first place there are to be chosen four knights from the whole county, who upon their oath shall choose two lawful knights from each hundred or wapentake, and these two shall choose upon their oath ten knights from the several hundreds or wapentakes; or, if knights be lacking, lawful and free men, so that these twelve may at the same time make answer upon all the heads for the whole hundred or wapentake.

These jurors were put a step further from the sheriff.[3] The reference to the coroners in this same commission to the itinerant justices in 1194 is in these words: "Moreover, in each county let there be chosen three knights and one clerk keepers of the pleas of the crown." As has been shown coroners were made for the purpose of cutting in on the sheriffs' powers.[4] We only need to go a little ways in the thirteenth century to find proof that coroners were regularly elected in the county courts, and it is probable that they were so elected from the start.

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[1] See above, p. 148.

[2] In practice they often chose sixteen, sometimes as many as twenty, to provide against the challenges of the tenant who might not be present at the election. Sometimes six or more electors were named by the sheriff, but four was the rule.

[3] A. and S., document 21; W. and N., pp. 92, 93. One must read through the articles of this eyre to understand the king's anxiety to get impartial juries, free from shrieval influence.

[4] See above, p. 196.

This seems to have been the earliest connection between the local use of representative knights for governmental purposes and popular election.[1] By the time of Magna Carta, undoubted instances are found of the popular election of knights for various local purposes. In article 18 of the Charter, there is mention of "four knights of the county chosen by the county," who were to act with the itinerant justices in holding the possessory assizes. The last word in the quotation might well be translated "county-court," as the Latin *comitatus* means that also, and the county court was the only assembly through which the county could act. In article 48 of the same document, in providing for an inquisition into the bad forest customs, it says that these "shall immediately be enquired into in each county by twelve sworn knights of the same county, chosen by the honest men of the same county." This language admits of no doubt that there was election in the county courts. As a final example, and one of much significance because it relates to the use of knights in assessing and collecting a tax, the language of a writ of 1220 for collecting a carucage may be cited. It is addressed to the sheriff of each county:

> . . . two shillings, to be collected by your hand and the hands of two of the more lawful knights of your county, who are to be elected to do this by the will and counsel of all of the county in full county court. And so we command you, firmly and strictly enjoining that, having summoned your full county court, by the will and counsel of those of the county court, you cause to be elected two of the more lawful knights of the whole county, who shall better know, wish, and be able to prosecute this business to our advantage; and having associated them with you, you are immediately

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[1] "The machinery for the election of coroners seems to have been the mould which shaped the representation of the shires in parliament; the coroners were prototypes of the parliamentary knights of the shire. Elected knights of the shire were also employed for other local purposes, but in a more casual or transitory way than in the case of the coroner. This latter office was a permanent institution, which must have helped to habituate the nation to the idea of county representation."—Gross, *Select Coroners' Rolls*, p. xxxv.

to cause that grant to be assessed and collected from the several ploughs throughout your whole bailiwick, . . .[1]

Just this method of assessing and collecting a tax was far from permanent, but the use of local knights for these purposes was permanent and was big with possibilities.

The Norman kings had never been wholly satisfied with the sheriff. They had kept this part of the Anglo-Saxon system as something which promised to be useful in conducting and safeguarding the royal interests and because he resembled the Norman *vicomte;* but the sheriff was resident in his shire, and was usually a great noble with landed and other interests there; he was subject to the influences, always potent in the middle ages, which tended to destroy the really public character of the resident official. Henry I. and Roger of Salisbury had begun to use the itinerant justice to oversee the sheriff and take part of his work from him. The shortcomings of the sheriffs in Henry II.'s time and what the king thought of them is well shown in the famous "Inquest of the Sheriffs";[2] and although fewer great nobles were appointed to the office afterwards, the possibility that public interests would be neglected for private interests still existed. The knights or others, when chosen for the purposes just discussed, were doing king's business; they might be called upon to tell about the doings of the sheriff himself. Doubtless the king came to feel that some form of popular choice was a safer way of obtaining these representative men and of being certain of an unbiassed statement from them. A machinery was developed, largely independent of the sheriff, for learning the truth about local affairs, getting at the locality's needs, and hearing its complaints.[3]

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[1] A. and S., document 30; W. and N., p. 96.

[2] *Ibid.*, document 15 and pp. 88, 89.

[3] Speaking of election, Professor Pollard (*Evolution of Parliament*, p. 152) penetratingly comments: "Election does not, in the middle ages, reveal the person of the elector, and means no more than the selection by the persons authorized to select. It is a matter of common knowledge that knights of the shire were selected in the county court, but by whom

3. Origin of County Representation in a Central Assembly.[1]—Having seen some of the local uses to which the king was putting knights and other freemen, the next development to be examined is the gathering together of local juries at some central point and the earliest appearance of such collected groups in connection with the king's council, small or large. As the king was questioning or consulting local men with increasing frequency upon all sorts of subjects, cases would be bound to arise in which there would be economy of time and effort in gathering groups to one point and carrying on the business *en masse* rather than for the king or his commissioners to travel about and talk to each group or jury in its locality. Such a method was bound to suggest itself early and there was no reason why the king should not adopt it. Almost as soon as the royal letters begin to be recorded in John's reign, they furnish us with examples of this concentration. How much earlier it was used cannot be known—probably not a great deal, for the instances are very few early in the reign, but are much more numerous in the latter part. The scale upon which concentration was used, the kinds of groups gathered, and the nature of the business transacted varied infinitely. All that it meant was that a strong king was carrying on his business as best suited him. For example, in 1204 he summoned for the same day and place twelve men to be sent from each of the Cinque Ports to meet the Archbishop of Canterbury and the sheriff of Kent "to talk about the king's affairs" and "to do the king's service as directed";

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they were really chosen is merely a matter of surmise." This contains a truth important to have in mind throughout the early history of parliament (see below, Part III., § III., 6); and yet it seems that in his treatment of election Professor Pollard neglects the evidently purposeful change made by the king in the method of selecting local unofficial agents to do his work. As the thing worked out in practice there must have been some lessening of shrieval influence as a result of these various county-court selections which he used. Otherwise it would be impossible to account for the long-continued and careful insistence upon them; there must have been obtained as a rule some expression of the popular estimate or will—not that the people were seeking it, but that the king wished it and must certainly have believed that he was getting it.

[1] W. and N., Problem III.—*Some Antecedents of the House of Commons.*

in 1207 all those having to do with the coinage, in sixteen specified cities or boroughs, were summoned to assemble in Westminster on a day named to give advice about coinage and to hear the king's command; in 1208 a summons was sent to all the ports in England containing various directions about shipping and ordering that the reeve with "two of the more discreet and wealthier men" of each port be at Portsmouth on a day named to meet the king or his commissioners and to answer questions and show what had been done in each port anent the king's commands. We are watching such practices because we know that years afterwards they led to profound changes in England's central assembly, but it is obvious that anything of this sort was the farthest from the thought of contemporaries. Two cases of concentration in 1213 have been much discussed because until recently they have been thought the earliest and because they have seemed especially in the line of House-of-Commons development. On July 21, John, who had been released from excommunication the day before, summoned the reeve and four lawful men from certain of his demesne vills throughout the counties of England to meet at St. Albans on August 4 to assess the damages and losses which the church had suffered at his hands. Undoubtedly only those vills were concerned which had had charge of the confiscated property, most of which had been seized by the king in 1208. The reeve and four men would be serving as juries of assessment in this case and it was evidently thought easier to concentrate the juries in this nation-wide investigation than to get their statements in their several localities. The fact that the meeting probably was not held does not detract much from its interest; it was certainly in mind, and was a broad and important application of the concentration method.[1] The other case is from November, when this writ was issued:

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[1] The chroniclers are silent about the meeting, a kind of meeting the monkish writers would have been almost certain to mention, and later in

The king to the sheriff of Oxford, greeting. We command you that all the knights of your bailiwick, who have been summoned to be with us at Oxford fifteen days after All Saints' Day, you cause to come with their arms; likewise the barons in person, but without arms; and you are to cause to come to us there at the same time four discreet knights of your county to speak with us about the affairs of our kingdom. Witness myself at Witney, the seventh day of November.

In the same way it is written to all the sheriffs.

The unarmed barons referred to would evidently constitute a great council. We cannot be sure that this assembly met; but whether it did or not its summons is of more significance than that of the August meeting, for here all the counties of England were to be represented by knights, the business sounds public and important, and county representatives and the great council would have been meeting at the same time and place.[1] There are other less interesting cases of concentration in the last four years of John's reign. It was a recognized method of doing business which the king used when it suited his convenience.

The method was not forgotten during Henry III.'s minority,[2] and in 1227 is the earliest known general concentration of popularly elected knights of the shire. For a year or two there had been friction between sheriffs and people, especially over the article of Magna Carta

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the summer the Archbishop of Canterbury seems to have taken the initiative in ordering local inquests on the same subject. Probably from July 21 to August 4 was too short a time to get such a meeting together, and of course John was not overly zealous. The summoning writs of this assembly are not extant, and a chronicler's account, based apparently upon a writ which he had before him, is brief and somewhat dubious. This has caused considerable discussion in recent years about what was actually intended. See H. W. C. Davis, *English Historical Review*, xx., 289, 290; G. J. Turner, *ibid.*, xxi., 297–299; A. B. White, *American Historical Review*, xvii., 12–16, D. Pasquet, *Essai sur les Origines de la Chambre des Communes*, pp. 46–52.

[1] For further discussion, see *American Historical Review*, xxii., 87–90; 325–329.

[2] In 1225 the Cinque Ports appeared before the great council in London by two instructed representatives each.

which prescribed how the sheriff should hold the county and hundred courts. On August 13 the following writ was sent to the sheriffs of England:

> The king to the sheriff of . . . greeting. We command you that in your full county court you say to the knights and good men of your bailiwick that they elect from among themselves four of the more lawful and discreet knights, who are to be before us at Westminster, three weeks after the feast of St. Michael, for the whole county, for the purpose of there showing the complaint, if they have any, against you in regard to the articles contained in the charter of liberties granted to them; and you yourself are then to be there to show reason for the demand which you make against them. . . . And you are to have there the summoners and the names of the knights . . . and this writ. Witness the king at Northampton, the thirteenth day of August, the eleventh year, etc.

This language leaves no doubt that the four knights were to be regarded as representatives in the sense that they were to speak for the whole county. It is equally certain that they were to be popularly elected in so far as that could be accomplished in the county courts of those days. And they were to come up from their respective counties to meet at the same time and place. Before whom or with whom were they to gather at Westminster? The writ gives no hint and the chronicles do not, but in view of the many activities of the king's Council throughout the minority just closed, the kind of business to be considered at this meeting, the expected presence of the king, and the place of meeting, it seems safe to conclude that it was the Council. We read nothing of a great council meeting on that date.

> The main purpose of assembling these knights of the shire was, it is clear, to get information—information of an unofficial sort, the people's side of the story. . . . They were juries representing the honesty and knowledge of their respective localities; and popularly elected in order that this

their jury character, might not be contaminated by shrieval influence. But all kinds of juries did more than furnish facts in a mechanical way; to some extent they judged facts, even at this date. It is hard to believe that one hundred and forty knights from all parts of England met at Westminster on a mission which must have interested them deeply without some comparing of grievances, interchange of opinion, or, if you please, deliberation. And surely the subject-matter was political.[1]

If it became the fashion for the king thus to gather local representatives, if it was done often enough, some kind of assembly consciousness was likely to result. But such things come slowly. In the years following 1227 there were occasional and partial concentrations of various elements and for various purposes, as in the period before, usually without popular election or an important public purpose. But the method was not forgotten, and in 1254, while Henry III. was in Gascony in desperate need of money, the regents, in the king's name, summoned a meeting of two representative knights elected in each shire and representative clergy from each diocese "to arrange what kind of aid they wish to furnish us in so great need." But there could not have been much "arranging" at Westminster, for the writs in the case of both laity and clergy make clear that the discussion and real determination of the amount of the aid were to take place in shire courts and diocesan synods, and that the representatives were to come to Westminster with definite instructions. However, here were again united representation (of a sort), popular election, and concentration on a nation-wide scale. As in 1227, it appears to have been the smaller, permanent Council before which the representatives appeared.

It is interesting to notice that not long before this the word *parliamentum* was beginning to be used for meetings of what we have been calling the great council. *Collo-*

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[1] On this general subject, see *Some Early Instances of Concentration of Representatives in England.* American Historical Review, xix., 735–750.

quium began to be so used in the latter part of the twelfth century, and continued to be upon occasion. One cannot help wondering whether the increased business and more active discussion of the larger, summoned king's court were not, from Henry II.'s time, reflected in new descriptive terms. Certainly the words were appropriate. The first use of *parliamentum* in this application[1] that has yet been found was in 1239. From this time on, it was used with gradually increasing frequency, while the older terms, *concilium* and *colloquium* continued.[2] But it was long before *parliament* had acquired the meaning with which one is familiar to-day. Speaking of its use as late as the end of Edward I.'s reign, Maitland says:

> A parliament is rather an act than a body of persons. One cannot present a petition to a colloquy, to a debate. It is only slowly that this word is appropriated to colloquies of a particular kind, namely, those which the king has with the estates of his realm, and still more slowly that it is transferred from the colloquy to the body of men whom the king has summoned. As yet any meeting of the king's council that has been solemnly summoned for general business seems to be a parliament. . . . The personification of "parliament," which enables us to say that laws are made by, and not merely in, parliament, is a slow and subtle process.[3]

There is no single word or phrase which can adequately describe the confused parliamentary foreshadowings of the thirteenth century; this would seem to make it logically imperative, at every mention of them, to enter into long and repetitious explanations.[4] On practical grounds it will be necessary occasionally to use the word parliament in a kind of anticipatory sense.

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[1] *Parliamentum* was a common enough Latin word of this period for various kinds of discussions or interviews, formal or informal. It and *colloquium* seem quite synonymous.

[2] See *Early Uses of "Parliamentum,"* Modern Language Review, ix., 92, 93, and *Was there a "Common Council" before Parliament?*, American Historical Review, xxv., p. 17.

[3] Introduction to *Memoranda de Parliamento*, p. lxvii. and note 1.

[4] "If we speak, we must speak with words; if we think, we must think with thoughts. We are moderns, and our words and thoughts cannot but be modern. Perhaps, as Mr. Gilbert once suggested, it is too late for us to be early English. Every thought will be too sharp, every word will imply

There was a turning point in the central use of locally elected representatives during the civil wars late in Henry III.'s reign, and Simon de Montfort was playing a leading part. In 1261 he summoned three knights from each county to treat with the magnates "concerning the common interests of the kingdom," and the king issued writs with the intention of drawing these same knights to a colloquy (*colloquium*) on the royal side. In June, 1264, Simon in the king's name again summoned knights to meet with "the prelates, magnates, and others of our faithful," this time four from each of twenty-nine counties, "chosen with the county's assent . . . to treat with us of the aforesaid matters" (described earlier in the writ as "our affairs and the affairs of our kingdom"). In these cases the representative knights of the shire were surely meeting at the same time as the great council and the language implies their share in public considerations of the most important sort. In December of 1264 Simon's famous parliament was summoned—famous because, in addition to the great council and two knights from each shire, there were to be sent to London two citizens from each city and two burgesses from each borough.[1] Here appeared the other representative element, which, along with the knights of the shire, was eventually to constitute the House of Commons. It is necessary to say something of the conditions and circumstances which lay behind borough representation.

4. **Condition of the Boroughs in the Thirteenth Century, and the Origin of their Representation in a Central Assembly.**—We have seen the boroughs of the twelfth century striving for liberties and immunities, their general object apparently an institutional isolation

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too many contrasts. We must, it is to be feared, use many words and qualify our every statement until we have almost contradicted it."—Maitland, *Township and Borough*, p. 22.

[1] A slight but interesting exception was that the Cinque Ports were to be represented by four each. See W. and N., p. 104.

such as was attained in some places by the continental cities.[1] By the middle of the thirteenth century, there were borough governments of the most diverse types, with perhaps a general oligarchic tendency. There was more of the corporate character in the older and larger boroughs, and their government was in the hands of a limited circle of burgesses or magistrates[2]; in many of the newer and smaller towns, the government was still popular, and in some it ever remained so.[3]

But more closely related to the present subject is the question of how far the boroughs had succeeded in cutting themselves off from outside control, from the general government of the country. Here also were various conditions, which grew out of the struggles and negotiations between the boroughs and their overlords; for the dispositions and abilities of the overlords to keep control of the borough governments were very different.

Some were almost independent republics, some were mere country townships that had reached the stage at which they compounded severally for their ferm, but were in all other respects under the influence of the sheriff and the county court.[1]

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[1] See above, Part II., §II., 3.

[2] The corporation in England had its origin in borough history, but was not fully developed much before the end of the middle ages. Maitland has strikingly cautioned against perverting history by finding corporations before they really existed: "If . . . we introduce the *persona ficta* too soon, we shall be doing worse than if we armed Hengist and Horsa with machine guns or pictured the Venerable Bede correcting proofs for the press."

[3] "Any complete generalisation upon the constitutional history of the towns is impossible for this reason, that this history does not start from one point or proceed by the same stages. At the time at which they began to take a share in the national counsels through their representatives, the class of towns contained communities in every stage of development, and in each stage of development constituted on different principles. Hence, by the way, arose the anomalies and obscurities as to the nature of the constituencies, which furnished matter of deliberation to the House of Commons for many centuries, and only ended with the Reform Act of 1832. The varieties of later usage were based on the condition in which the borough found itself when it began to be represented." The matter "is noticed here in order to show that the obscurity of the subject is not a mere result of our ignorance or of the deficiency of record, but of a confusion of usages which was felt at the time to be capable of no general treatment; a confusion which . . . prevailed from the very first, and occasioned actual disputes ages before it began to puzzle the constitutional lawyers." Stubbs, *Constitutional History of England*, § 211.

But the important fact is that the boroughs, as a class, had not by this time gone so far upon the road to independence as to make the obtaining of their representation impossible, or to give that representation, if obtained, such exclusiveness or class consciousness that it could not co-operate with the representatives of any other part of the population. The king demanded the boroughs' presence by twelve burgesses in those full meetings of the county courts convened by the sheriffs for the itinerant justices, thus to some extent holding them under the royal jurisdiction. The sheriffs enforced the Assize of Arms within them, and led their military levies as part of the national militia. And there were among the boroughs no leagues or combinations by which they could shape a common policy.

Juries had been used for getting information, and specifically for assessment purposes,[2] inside the boroughs as well as out; and the regular representation of boroughs in the great eyre courts, where such varieties of business were transacted, may have suggested to Simon de Montfort the possibility of their representation in a central assembly,[3] but it is more probable that the suggestion came from the general practice of concentration, which for more than half a century had, upon occasion, been applied to boroughs on both a large and small scale, as to other elements of the population.[1] The motive which led him to summon burgesses at this time was undoubtedly the weakness of his hold upon the upper classes. He sought to counterbalance this by getting the support of the middle and lower classes, and especially this burgher class which might prove very useful financially. It is hardly necessary to state that de Montfort's "parliaments" were not national assemblies, but meetings of the adherents and representatives of a party at a time when the country was divided in civil strife. But the machinery of borough representation at the center was not lost. Of its future use in central assemblies or that any new kind of assembly was being shaped, Simon de Montfort had, of course, no more idea than any of his contemporaries.[2] A hundred years earlier Henry II. had, from time to time, added such elements to the feudal core of his council as the business of the occasion suggested. Since that time the growth of ideas of representation and local election were making it easier for the king to call up and use such parts of his people as he chose. But the purpose and result were still much the same.

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[1] Stubbs, *Constitutional History of England*, § 213.

[2] See Assize of Arms, art. 9, A. and S., p. 24; W. and N., pp. 90, 91.

[3] It is interesting to note that these local courts contained all the elements which constituted the later Parliament. But Parliament was not being modelled after them for the simple reason that no one was consciously making Parliament, and in the development of central assemblies for his own ends the king does not seem to have gotten any suggestion from the county courts. A part of the first clause of a writ to assemble such a court in 1218 reads: "The king to the sheriff of Yorkshire, greeting. Summon by good summoners all archbishops, bishops, abbots, earls and barons, knights and freeholders of your whole bailiwick, and from each vill four lawful men and the reeve, and from each borough twelve lawful burgesses, throughout your whole bailiwick, and all others who are accustomed and ought to come before the justices itinerant. . . ."—W. and N., p. 94.

Having up to this point dealt with antecedent conditions and causes and the bare beginnings of what may be called an embryonic Parliament, the subject now broadens and three rather general divisions naturally suggest themselves: first, the external history of the institution, its form and composition through the critical changes of its early years until it attained some stability in these respects and developed its characteristic features; secondly, the electorate through the first century and a half of Parliament's life; thirdly, how Parliament grew conscious of itself, developed its powers, and became a source of initiative and authority.

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[1] See above, pp. 358, 359, 362.

[2] Professor Adams believes that "borough representatives would have been summoned to the great council by the close of the century if Simon's writs had never been issued and for reasons very different from those which influenced his action." His grounds for this opinion are the rapidly growing importance of the boroughs in the thirteenth century and the fact that the "stricter feudal ideas" were passing away.

5. Form and Composition of Parliament from 1265 to the Middle of the Fourteenth Century.—The period from Simon de Montfort's Parliament of 1265 to the end of the century was a critical and experimental time in the life of the young institution. It might be more truly said that there was no new institution until 1295 or thereabouts; there was no thought of it as such in the minds of the men of that generation. They knew only of certain new practices, the questioning of groups of locally elected representatives about taxation and other matters in which the king was interested.

To show how no one was thinking of a new assembly of any definite form and at the same time to see the active use of the new practices, one needs only to glance at this period. In May of 1265, just after the royal victory at Evesham and not more than two months after Simon's famous Parliament ended, the king summoned, in addition to the baronage, from each cathedral chapter

> two of your more discreet canons for the said day and place, who are to have full power to deal with us in your stead along with the aforesaid prelates and magnates in regard to the business stated, and to do in your name what you yourselves would be able to do if you were present there.[1]

In the assembly of 1273, the first of Edward I.'s reign, were present the three elements necessary to a Parliament in the later sense: the great council, representatives of the shires, representatives of the cities and boroughs. The purpose of this assembly was mainly to swear allegiance to the new sovereign, not yet returned from the Holy Land; but a few matters incident to the new reign were dealt with tentatively. Again in the first assembly of 1275 the same three elements were gathered and it is notable for instituting the "ancient" custom on wool,

[1] Stubbs, *Select Charters*, pp. 406, 407.

woolfells, and hides—the foundation of the customs system.[1] At a second meeting of the same year, representatives of the shires were present and a money grant, a fifteenth of movables, was arranged. In 1283, there were two very peculiar assemblies. Most of the nobles were with the king on the Welsh campaign; hence the first, which met in January in two divisions, one at York and the other at Northampton, was without the baronage. It consisted of representatives of the shires and boroughs.

To these were added representatives of the cathedral clergy. The purpose of this was undoubtedly financial; it was characteristic of Edward I., who aimed at a broad representative basis for his money grants, and was consistent with the whole representative movement of the thirteenth century. The two places of meeting, north and south, seem to have been suggested by the Convocations of Canterbury and York.[2] It is interesting that it was regarded as nothing extraordinary for knights and burgesses to meet and do business in the absence of the nobility. A second assembly of this year met in September, at Shrewsbury on the Welsh border. Thus the nobles, who were still under arms against the Welsh, could be present, and to them were added representatives of the shires and of certain specified boroughs. The main object mentioned in the writs was to judge David of Wales, but it was added that "other matters" were also to be attended to. The Statute De Mercatoribus of Acton Burnell was dated October the twelfth at Acton Burnell, and was the product of the deliberations of the burgesses who had withdrawn to that place from the Shrewsbury assembly. But its language retained the stereotyped form, "the king by himself and his council hath ordained," etc.[3] This second assembly of 1283 is then noteworthy in not containing any clergy—apparently because its business did not concern them—and in its dividing, the nobles remaining at Shrewsbury to perform their more proper function in judging the Prince David while the burgesses withdrew to another place to deal with a commercial matter. The king was certainly not consciously fashioning a general assembly; on the contrary, he usually adhered to the idea that that which concerned only one class should be dealt with by that class alone. Early in 1290, a meeting of the barons acted upon the purely feudal matter of granting the king an aid incident to the marriage of his oldest daughter.[1] Later in the year, this same body made the famous statute of Quia Emptores, a statute which especially concerned the greater landholders. Only a week after, there were added representatives of the shires, apparently for the sole purpose of negotiating a money grant. In 1294, there was a meeting of the barons and the representatives of the shires. The purpose was largely financial, and a "tenth" was granted. The towns were also taxed, granting a sixth, but were dealt with separately through commissioners.[2] Late in 1295, after an earlier meeting of the barons, was summoned the assembly distinguished in later history as the Model Parliament.

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[1] See below, pp. 405–411.

[2] Perhaps there were other reasons. Professor Pollard believes that there was a real danger of the development of provincial estates instead of one national assembly. See *Evolution of Parliament*, pp. 137ff.

[3] A. and S., document 41. In this use of the word council, where *consilium* seems really to mean a body of men rather than the counsel which

It is probable that the use of the term Model Parliament has led to the popular ascription to Edward I. of ideas quite in advance of any which he ever entertained. It is proper to remember this Parliament and its date as important in parliamentary history; but there is always danger in using any event as marking an epoch, an exaggeration of its epoch-making character. The reason

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was given, was undoubtedly indicated the smaller, permanent council. This body was then taking on such technical and definable characteristics that it may soon be considered a separate body. See above, pp. 296, 297.

[1] Though here were feudal nobles acting on a feudal matter, it should be remembered that there were many tenants-in-chief who might be held for the aid who would not be found in the great council as it was then constituted.

[2] This was not a tallage; a tallage was levied on movables and rents, whereas the sixth was levied on movables.

why Edward I. summoned such an inclusive and, from a later point of view, model assembly was the financial pressure of the unprecedented combination of wars which he had on hand. He needed money as never before, and he used the means to obtain it which his experience in the past thirty years and his instincts as a practical statesman suggested. He needed the help of all classes and, as far as conditions allowed, he took them all into his confidence. It can hardly be thought that the representatives were really asked to give their consent to taxation, but their good will could be gained and consultation with them certainly helped in assessment and collection. There was no theorizing, and the high-sounding adaptation from the Theodosian Code to be found in the summons to the clergy was probably the insertion of a clerical official in the Chancery.[1] To suppose it a great principle, weighed and set forth by Edward I., would be out of harmony with the events and spirit of earlier and later history. The Parliament of 1295 was simply a fact, great in itself, and made prominent by the crisis which occasioned it; it worked by its own weight, and, fitting in with the trend of events, it was not forgotten and became a precedent in English constitutional history. Kings had been working toward the use of the representative principle in national affairs. Now events seemed to demand a completer application of that principle than before, and the emphasis thus placed upon it permanently affected both king and people. With no regularity in the application of this principle to national assemblies before 1295, it must not be understood that there was a close approach to it afterwards, but merely that a long step had been taken in that direction. The frequency with which the king, throughout the middle ages and even occasionally afterwards, summoned the lords without at the same time summoning county or borough representatives is the chief indication that there was little notion of a new assembly with a fixed make-up. Such meetings may very properly be called great councils, as earlier. Their continuance shows why contemporaries could not talk of a "house" of lords. How could the lords be a "house" when it was quite as normal for them to meet by themselves as in conjunction with the commons?[1]

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[1] "As a most just law, established by the careful providence of sacred princes, exhorts and decrees that what affects all, by all should be approved, so also, very evidently should common danger be met by means provided in common."—A. and S., p. 82. See Riess, *Geschichte des Wahlrechts zum englischen Parlament im Mittelalter*, pp. 1–14, for a discussion of this clause and the author's conception of the true object of early representation in Parliament. Said Maitland, "The making of grand theories has never been our strong point. The theory which lies upon the surface is sometimes a borrowed theory which has never penetrated far, while the really vital principles must be sought for in out of the way places. A dogma is of no importance unless and until there is some great desire within it. *Quasi* is one of the few Latin words that English lawyers really love. English history can never be an elementary subject. We are not logical enough to be elementary." Fisher, *F. W. Maitland*, p. 161. But it should be known that the famous clause in the clerical summons was not without thirteenth-century precedent. It is recorded by the chronicler Wendover that at the Christmas meeting of the court in 1224, after the festival had been celebrated, Hubert de Burgh told of the injuries which the king had suffered in his French possessions, and then reminded the earls and barons that they had suffered damage in their holdings there also, "and since many are in the cause, the aid of many will be necessary." A tax of "a fifteenth" was granted. Matthew Paris, *Chronica Majora*, iii., 91. Also in the famous council of 1244 which proposed to elect the king's ministers, it was stated that the ministers "ought to be created by common election, for as they are to transact the business of all, so in their choice the assent of every one should find place." *Ibid.*, iv., 366–368. "All" and "everyone" no doubt were limited to barons in their thought; but yet it was a notable utterance and one may easily see in it much future history. The recording chroniclers were of course churchmen and they may have drawn on un-English sources for their phrasing, but it is impossible to read the contemporary narratives of the early and middle thirteenth century without the conviction that political thought in England was unusually vigorous and bold. There is

The Model Parliament contained the body of prelates and greater barons which was to become the House of Lords. The lay members of this body numbered forty-

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a background here of later constitutional development that is not well known.

For the writs of summons to the Model Parliament, see A. and S., document 46. Particular attention should be paid to the last paragraph of the summons of county and borough representatives, where the purpose and spirit with which they were summoned is clearly shown.

[1] The last time the lords met alone was in the seventeenth century. The king occasionally dealt individually with other elements after 1295. Note the instance in 1372 when the citizens and burgesses "were commanded to tarry" after the dismissal of the knights.—A. and S., document 81.

eight in this meeting, seven earls and forty-one barons below the rank of earl. The prelates, summoned by virtue of their baronial tenure, comprised the two archbishops, eighteen bishops, sixty-seven abbots, and the heads of three religious orders, the Hospitallers, Templars, and the Order of Sempringham. The bishops were ordered to cite beforehand (*præmunientes*)[1] the deans or priors of their cathedral chapters, the archdeacons of their dioceses, one representative proctor from each chapter, and two representative proctors from the parish clergy of each diocese. Besides the clergy and the nobility, this Parliament contained a representation of thirty-seven shires by two knights each[2] and of one hundred and ten cities and boroughs by two citizens or burgesses each.[3]

A pause must be made here for some explanation of what lay back of the element of clerical representation which the king was occasionally bringing to his assemblies. While, during the thirteenth century, the representative principle was being applied to lay assemblies, the clergy had been perfecting a system by which the Convocations of their two great archiepiscopal provinces, Canterbury and York, were becoming bodies quite perfectly representing all classes of their order.[4] In taxing the clergy, or indeed for other purposes, the king occasionally made use of this machinery,[5] which he found ready to his hand, just as he used an analogous machinery in taxing the laity. It is not the place here to study in detail the origin and growth of Convocation, but some of its features must be noticed in order to understand the early history of Parliament.

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[1] The clause introduced by this word, which has always been retained in the writ summoning the bishops, is often spoken of as the *præmunientes* clause. See A. and S., p. 83. It has been regularly disobeyed since the end of the fourteenth century. See below, p. 379.

[2] This was the number of shires under the king's routine administration at this time. It did not include the old palatine counties of Chester and Durham. Neither the county nor city of Chester was represented in Parliament till 1543; and Durham not until 1672.

[3] It has been estimated that at one time or another during the reign of Edward I. one hundred and sixty-six cities and boroughs were represented.

[4] See Ernest Barker, *The Dominican Order and Convocation*, Part II., *The English Convocation*.

[5] See above, p. 353 and note 2.

Before the thirteenth century, there were two principal ecclesiastical assemblies: diocesan synods, which were quite exhaustive meetings of the clergy of the diocese; and provincial synods attended, in each of the archiepiscopal provinces, by the bishops, some of the abbots, and later the archdeacons. Until the thirteenth century, as far as the clergy had been consulted at all about money grants, there had been negotiation by royal officials with the individual dioceses, sometimes probably through the diocesan synods. But this had been much more a matter of demanding and collecting than of consulting or asking consent. If there were to be real consultation of the clergy, it must be in a body where concerted action of the higher clergy would be possible, namely, in the provincial synod. The intense opposition to John's misrule made it necessary for him to treat the clergy with more consideration, and he was the first king to make any approach to a consultation of the provincial synods on money grants. The successful stand led by the Bishop of Lincoln against the unusual aid proposed late in his brother's reign shows that the time was ripe for such a development.[1] The new importance attaching to the provincial synods, as bodies consulted in matters of taxation, was probably the leading cause of their development into representative Convocations in the course of the century. In 1226, proctors representing the cathedral chapters and the monasteries were added to the old elements. But it was not until 1273 and 1277 that the parochial clergy began to be represented, and it was in a series of meetings, 1280 to 1283, under the stress of Edward's demands for money, that in the provinces both of Canterbury and York the ecclesiastical assemblies took on their final form; all elements of the clergy were either present in person or by representatives, and the two old provincial synods had become two representative Convocations. These usually met at the same time and were often thought of and spoken of as the Convocation of the whole church.[1]

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[1] See above, pp. 264, 265.

These Convocations consisted of the following, who attended in person: bishops, abbots, priors, the deans of cathedral and collegiate churches, archdeacons, and the heads of certain religious orders. The representative elements were the two proctors from each diocese (in York from each archdeaconry) representing the parish clergy, and one proctor for each cathedral and collegiate chapter. Of course Convocation was a purely ecclesiastical body in purpose and make-up, although the king might consult it on civil matters, especially taxation. But during the same century that this body was growing, a parallel and related development was in progress which ended in complete ecclesiastical representation in the Parliament of 1295.[2] The king was showing a greater and greater inclination to summon clergy to lay assemblies, but the manner of summons and the elements summoned were largely determined by the contemporary development of the Convocations. As far back as 1177 Henry II. summoned deans and archdeacons to a notable great council.[3] John upon at least one occasion summoned the deans to represent the cathedral chapters, and there is an interesting instance in 1207 in which the prelates refused to bind the unrepresented clergy of the dioceses in the matter of a tax which the king demanded;[1] and there were later instances of this attitude. Cathedral deans were summoned to a parliament in 1265, and there were a few other cases, which it is not necessary to notice, before the very important one of 1283. It can be understood now that the significance of that case lay largely in the fact that the king used this system of clerical representation in a lay assembly in the very year that it was perfected in the ecclesiastical assemblies. It might fairly be expected that if the king were to continue his use of the system, it would be in the completed form which it had just attained. In 1294, Edward summoned an assembly of the clergy, with all the representative elements then used in Convocation, but it seems to have met at a different time from the lay portion of his Parliament, although summoned for the same purpose, namely, revenue. The next year in the Model Parliament, the full clerical representation was summoned at the same time as the other elements, and perhaps with the idea that all these elements constituted, for the time at least, a single body. Thus the clergy became a part of the embryonic parliament; part of them, the representatives, were there purely as clergy, while the prelates had a double basis for summons.[2]

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[1] For illustrative documents, see Stubbs, *Select Charters*, pp. 444–447.

[2] Barker's study, *The Dominican Order and Convocation*, proves this. He says (p. 75), "The development of representation in Church and State must not be figured in the mind as the advance of two parallel lines in two separate squares; it is the growth of one idea. . . ." But his thesis that Dominican influence played the commanding part in all this has not been generally accepted. Royal practices in the line of representation, election, and concentration were well along before there was any Dominican Order.

[3] Benedictus Abbas, *Gesta*, i., 145. This was the council summoned to make the award in the dispute submitted to Henry II. by the kings of Castile and Navarre.

In studying the origin of the English Parliament, one is too likely to pause at the date 1295, as if the great institution were then already completed or nearly so. It should not be forgotten that had Parliament remained what it was in that year there would be little cause for interest. Certain very fundamental changes in its make-up and internal arrangement must take place, some of which appear entirely accidental, before it could become a power in government in any way apart from the king. It may be said that there were three estates in the Parliament of 1295 (though the people of the time seem neither to have talked nor thought of such estates): the first estate, clergy; the second estate, lay nobility; the third estate, burgesses. The first estate would, of course, include the prelates, who were there also as barons, as well as the representative clergy. If the second estate comprised all lay nobles, it must include not only the barons but the representative knights of the shire as well. For the knights were technically nobles, and, though they came distinctly and consciously representing the counties that chose them, their formal and historical position seems at first to have drawn them to the barons and away from their more natural associates, the burgesses. Just how these people sat (or stood) in Westminster Hall is a doubtful matter. Professor Pollard pictures the council or great council sitting on a platform with the representative elements coming into its presence.

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[1] Stubbs, *Select Charters*, p. 268.

[2] Probably the technical basis remained their old baronial tenure. All the bishops were barons, and the abbots stressed the baronial basis—this because they did not wish to attend and insisted that they should not unless they held by baronial tenure. No abbot became a prominent statesman; the internationalism of the regular clergy worked against their interest in national politics. See above, pp. 133, 344 and note 3.

> They did not sit together, for the commons [citizens and burgesses], at least, stood in the presence of the king and council, and the attitude of Edward I. was somewhat patriarchal. . . . The commons, at least, were summoned not to decide, but to consent to decisions; and the object of their presence was not to tie the hands of the council, but to unloose the pockets of their constituents.[1]

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[1] *Evolution of Parliament*, p. 59. On the three estates, see *ibid.*, ch. iv. Professor Pollard believes that the idea of the three estates was not present in England until the fifteenth century and was then largely a French imitation.

The use of the term "parliament" at the beginning of the fourteenth century is admirably illustrated by the meeting of 1305. Maitland says of it: "It was a full parliament in our sense of that term. The three estates of the realm met the king and his council. The great precedent of 1295 had been followed and, if the writs of summons were punctually obeyed, the assembly was a large one." It was opened at Westminster on the 28th of February. "This assembly was kept together for just three weeks. On the 21st of March a proclamation was made telling the archbishops, bishops and other prelates, earls, barons, knights, citizens, and burgesses in general that they might go home, but must be ready to appear again if the king summoned them. Those bishops, earls, barons, justices, and others who were members of the council were to remain

Of course there were no "houses" in an assembly of this sort, but if the mobile material of 1295 had, as might seem natural, hardened along the lines of clergy, nobles, and third estate into a three-house body, one might expect its failure on at least two grounds: in the first place, in three-house assemblies, two of the houses are likely to intrigue against or outweigh the third, and an assembly ill-balanced and divided against itself results; in the second place, if the knights were to continue to sit with the barons, it left the burgesses the only true representatives of the non-noble class, the only people in the assembly that could be termed *commons;* and in the middle ages, the urban population was not of sufficient consideration or strength to make by itself an effective "house." The knights would have been left in an unnatural and ineffective position; and these representative knights, as has been shown, were the most valuable and *English* of all the elements in Parliament; they stood for what was then to be found in no other country, a substantial middle class outside the city walls. And unless the middle class outside the city walls could, through its representatives in Parliament, unite with the middle class inside the city walls through its representatives, there could be little to guarantee the rights and liberties of the English commons against the encroachments of nobility and crown.[1] The great historic English Parliament was no foregone conclusion in 1295.

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behind and so were all those who had still any business to transact. But the 'parliament' was not at an end. Many of its doings that are recorded on our roll were done after the estates had been sent home. The king remained at Westminster, surrounded by his councillors and his parliament was still in session as a 'full' and 'general' parliament as late as the 5th and 6th of April."—Introduction to *Memoranda de Parliamento*, pp. xxxv., xxxvi.

[1] It should not be supposed that the separation of the lesser from the higher nobility was complete in 1295; if it had been, it would be difficult to account for the position taken by the knights when summoned to Parliament. In fact, it was just at this time, aided by the statute of Quia Emptores, that the process was going on most rapidly. Let it not be forgotten, however, that it was not in anything belonging to this immediate period that this most fateful movement had its source, but, as has been shown above (pp. 347–353), long before and in events and conditions lying at the basis of English history.

The first great change after 1295 was the withdrawal from Parliament of the clergy as clergy. It happened to be a time when they were very sensitive about being taxed by the state. Boniface VIII. was pope, whose momentous conflict with Philip IV. of France was opened upon this very issue. The clergy knew that the king summoned them to a lay assembly that he might the more readily tax them. The idea that honour attached to representative membership in such an assembly was foreign to the time; to representative clergy or laymen or their constituents the royal summons laid a burden which was taken with reluctance. All the prejudices of the clergy drew them away from this kind of association with laymen; the whole trend of events since the Norman Conquest had been towards separation between clerical and lay institutions under the impulse of the "reform" movements on the continent. The clergy were becoming conscious of themselves as a distinct and superior order. They had just perfected their own Convocation, where they could negotiate taxes just as well and without compromising their dignity by becoming members of a secular body. Their reluctance to attend Parliament was probably at first regarded by the king as a kind of insubordination; but money was what he wanted and, if he could get that as well from Convocation, he was hardly in a position to fight out a purely theoretical issue. The representative clergy began to show their disinclination to come to Parliament soon after 1295, and for about forty years the king made some attempt to secure their presence; then, although the *præmunientes* clause was retained in the writs to the bishops and there was occasional attendance of a few, the matter ceased to be an object with the king, and the clergy in their Convocation granted subsidy for subsidy as granted by Lords and Commons in Parliament.[1]

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[1] For an illustration, see A. and S., documents 66 and 67. Down to 1340 the clergy were summoned, as the laity, *ad faciendum et consentiendum.* After that, the form was more often *ad consentiendum*, which became stable in 1377. They could consent by being silent, by not coming.

The withdrawal of the clergy left two estates in Parliament. The clergy who remained, the bishops and part of the abbots, remained as barons, not as clergy. There were left then the second estate and the third estate, the nobles and the burgesses. Though a two-house assembly may be superior, as such, to a three-house assembly, yet it cannot work well unless there is some equality between the houses. If the knights continued to rank themselves with the nobility, the houses of this English assembly would be unevenly matched, and the question whether the knights of the shire would permanently cast in their lot with the lords or with the burgesses was perhaps the most critical in the whole history of Parliament. There is evidence of uncertainty upon their part from the beginning and, although there are several instances in which it is known that they sat and voted subsidies with the barons, and this may be fairly considered their normal action in the early years, they sometimes seem to have regarded themselves almost as a separate estate and to have sat and voted alone. Their first approach to the burgesses was to join them in petition; "the closing years of Edward II.'s reign and the opening years of Edward III.'s seem to be marked by the earliest common petitions of the knights and burgesses who came to constitute the house of commons."[1] This well illustrates their situation; they were naturally with the burgesses, for they found themselves wanting to ask for the same things, while formally they were nobles and in formal action still took their position as such. But the change once started grew rapidly, and before the end of the fourteenth century the representative knights of the shire were regularly sitting and voting with the representative citizens and burgesses.[2] A House of Commons was being made. There was nothing striking or spectacular connected with this change, one of the greatest events in the history of the English government; it was the working out of forces and conditions, some of them centuries old, some of them recent, but numerous and working silently and irresistibly. No one thought that anything remarkable was taking place. We pause to emphasize it because we know how much English history, how much world history, lay in that small change.

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[1] Pollard, *Evolution of Parliament*, p. 119.

[2] But like all English changes it was not complete; instances of separate action continued—one has been found as late as 1523. *Ibid.*, pp. 112, 113. The knights not only furnished position and influence in the developing lower house, but till the end of the middle ages they usually surpassed the burgesses in numbers. See below, p. 394.

A money consideration was the chief immediate cause of this transfer of the knights. They, like the burgesses, stood for the poorer parts of the community; united action would be a great advantage in the attempt to control taxation, and this united action seemed possible and not unnatural as the result of all previous English history. It must be remembered that these representatives were not yet legislators or counsellors; they were a concentration of local unofficial groups.[1] And how had the king been using such groups, whether gathered in one place or consulted locally? Very often to give information bearing on his revenue, and then to help and advise in its assessment and collection. To be sure the representatives in Parliament in the early fourteenth century did a little more than this; they did, in some sort, consent to taxation, although this function could be easily overstated; and they certainly furnished the king, through petition and otherwise, with local information which proved a check upon the work of his officials, especially the sheriffs. These he still distrusted, and their arrogant and oppressive behaviour often bore heavily upon the people. This last-mentioned use of representatives was increasing in importance.[2]

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[1] "The members came to Westminster not as sent from sovereign constituencies, but as summoned by a sovereign lord; they attended not as delegates with imperative mandates to do what their constituents told them, but as the unfortunate and unwilling persons selected by their fellows to carry out the requirements of the crown."—Pollard, *Evolution of Parliament*, p. 139.

[2] Riess, in his *Geschichte des Wahlrechts zum englischen Parlament*, ch. i., regards the checking and controlling of the royal officials in their local

Professor Pollard's picture of the look and behaviour of an early Parliament when dealing with a money grant, which he deduces from the slight evidence that has been left, is most interesting.

> There is reason to believe that from Edward I.'s time the king's council sat in the midst of this assembly on four woolsacks facing one another, . . . [an arrangement adapted to] confidential deliberation. Outside this inner ring there sat, to the right of the throne, the spiritual lords, and to the left the temporal lords, and facing the throne there stood the commons. To them the demand for aid would be particularly

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administration as the first object with Edward I. in summoning local representatives to Parliament; he believes that in *Confirmatio* consent to taxation was not extended, except in a purely formal way, beyond tenants-in-chief, but that this formal consent came gradually by force of custom and favouring circumstances to have a real significance. See also Riess, *Der Ursprung des englischen Unterhauses* in Historische Zeitschrift, lx., 1–33. On p. 3, he says : "To attain a genuine and regular control of the local administration and to carry out especially the assessment and collection of taxes with the least possible friction were the most substantial reasons for which Edward I. added to the English constitution as a perfected and enduring institution the system of representation that had earlier been only sporadically connected with it." In speaking of what the Commons did in the Parliament of 1305, Maitland says : "The king, so far as we know, did not ask them for money, nor did he desire their consent to any new law. The doctrine that in these days the representatives of the shires and towns were called to parliament, not in order that they might act in concert on behalf of the commons of England, but in order that each might represent before the king in council the grievances and the interest of the particular community, county or borough, that sent him thither, may easily be pressed too far, but we shall probably think that there is no little truth in it, if we ask what the knights and burgesses were doing, while the king and his councillors were slowly disposing of the great mass of petitions, many of which were presented by shires and boroughs. Official testimony the council can easily obtain; but it wants unofficial testimony also; it desires to know what men are saying in remote parts of England about the doings of sheriffs, escheators, and their like, and the possibilities of future taxation have to be considered. Then again there are many appointments to be made; for example, it is the fashion at this time to entrust a share of the work of delivering the county gaol to some knight of the county, very often one of the knights who is representing or has represented that county, at a parliament. Without denying that the germ of a 'house' of commons already exists, without denying that its members hold meetings, discuss their common affairs and common grievances, . . . we may still believe that the council often gives audience, advice, instructions to particular knights and burgesses. After all we shall have to fall back upon the words of the writ of summons:—the commoners have been told to come in order that they may do what shall be ordained."—Introduction to *Memoranda de Parliamento*, pp. lxxv., lxxvi.

addressed, and then the problem of how and what to answer would arise. Probably there would be a division of opinion, and possibly discordant murmurs; courageous commons at the back might urge in whispers to their colleagues in the front the exorbitance of the king's demands and the necessity of refusal; timid members at the fore might tell their daring but half-concealed advisers at their back to speak for themselves; and then, amid the muttering and murmuring, the chancellor or other member of the council might suggest that not much progress was being made, and that the commons should go and talk it over among themselves, and then come back with an intelligible answer. On some such occasion it must have been suggested that they should choose some one of their members to be their Speaker, and that his answer, whether representing unanimity or but a small majority, should be considered equally binding upon all. The commons then trooped out of parliament to discuss in some more private place their domestic differences. They only reappeared in parliament when they had reached a resolution which was reported by the Speaker; and he alone had liberty of speech in parliament.[1]

Soon sessions in separate buildings became regular: the lords in the king's parliament chamber and the commons in the chapterhouse of Westminster Abbey.[2]

6. **The Electors, the Elected, and the Election in County and Borough During the First Two Centuries of Parliament.**—In discussing the beginnings of representation and election, the king's early use of them for local purposes, his concentration of local groups at convenient points, the resulting gradual growth of a representative element in the national assembly, and the joining of knights and burgesses in a lower house, nothing has been said of the way in which the elections were conducted or how they were regarded, and but little of the personnel of the elected. Probably not much detail on these subjects will ever be known. For the fact, already

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[1] *Evolution of Parliament*, p. 121.

[2] Westminster was the usual but not the only place where Parliaments were held in the fourteenth and fifteenth centuries. Several were held in York and a few other places.

often stressed, that Parliament grew while no one had the least idea of what it was to be or its importance, explains why no one wrote about its elections.[1] But the leading features can be stated with some confidence.[2] The representatives of the shires were probably always knights in the very early Parliaments; but the burdens of representation so far outweighed any advantages that seemed possible that those whose property made them eligible to knighthood, through the provisions of the Distraint of Knighthood,[3] often paid the fine required by that act rather than assume the local duties which knighthood carried with it or risk an election to Parliament. The result was that, throughout the fourteenth century, many below knightly rank were returned from the counties. No positive law upon the subject was enacted, but the kings made various attempts to have knights returned, the writs of summons usually demanding that "belted" knights be chosen. Beyond this, the requirements and disabilities seem to have been these: the county representatives must be inhabitants of the county electing them and must be men of ability, consideration, and property; and in the fourteenth century statutes were passed excluding sheriffs and lawyers from Parliament on the ground that with them more particular interests than those of the community in general were uppermost.[4] A statute of 1445 summed up most of the ideas of previous times, but shows that the king had had to concede the point about belted knights. It states that

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[1] It was not till late in the fourteenth century that the first description of Parliament was written, the brief and somewhat unreliable *Modus Tenendi Parliamentum.* See Stubbs, *Select Charters*, pp. 500–506. This gives no description of elections.

[2] This is owing largely to the painstaking researches of Riess. His monograph, *Geschichte des Wahlrechts zum englischen Parlament im Mittelalter*, is the authority upon the subject.

[3] Beginning at least as early as 1224, there is a long series of enactments, known under the general term Distraint of Knighthood, whose object was, under penalty of fine, to make all who had the property qualifications for knighthood assume its name and insignia. Men were avoiding knighthood in order to escape the public duties which the king was crowding on the knights. The long-continued Distraints of Knighthood are striking evidence of the extent of the knights' unwilling share in government. For the text of the 1224 enactment, see W. and N., pp. 96, 97.

[4] A. and S., document 80.

> the knights of the shire for the parliament . . . shall be notable knights of the same counties for the which they shall be so chosen, or otherwise such notable esquires, gentlemen of birth of the same counties, as shall be able to be knights.[1]

The knights of the shire (the elected representatives of the counties had come to be so called whether they were actually knights or not) were elected in the county courts. Many writers have been inclined to think that these knights were at first elected solely by their own class and went to Parliament as representatives of that class. There has seemed to be an *a priori* logic in supposing, when the minor tenants-in-chief ceased as a class to receive the special writs of summons and chosen members of the class went up from the counties, that their class only was concerned in the transaction.[2] The theory falls to the ground however when tested by the evidence. In all the local activities of elected knights (with no distinction between knights who held of the king and those who held of mesne lords), activities which suggested and led to representation in a central assembly, they were certainly regarded as standing for the best knowledge and judgment of the whole community; and knights were often associated in this work with the non-noble freemen below them, the provision appearing repeatedly that when there were not knights sufficient the number was to be filled out with free and lawful men.[3] Moreover, the business upon which they were employed had no limitation to a single class. And in coming to the later representative activities of the knights in Parliament, the language of the summoning writs is very clear to the effect that they were to come for the whole county and were to be elected in *full* county court. This idea is expressed so many times and in such a variety of ways as to leave no doubt that the whole court was supposed to be concerned in the electing, and that the knights went up to Parliament representing all the elements of the county as found in the county courts.[1]

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[1] A. and S., document 125. The belted knight, the knight girt with the sword, was of course the one who had assumed the knightly insignia and name. But Distraint of Knighthood had been ineffectual, and now potential knights could be sent to Parliament. After a time they were not always potential.

[2] But it is a curious fact that the language and circumstances of the writ of 1254, the writ that has loomed so large in the early history of Parliament, make it practically certain that on that occasion the knights who represented the counties were not tenants-in-chief, but subtenants.

[3] For examples, see art. 1, Assize of Northampton; art. 9, Assize of Arms; the commission of 1194. A. and S. or W. and N., *passim*.

Who went to the county court? It is impossible to answer by a definite enumeration; for long before this, suit of court had become attached to certain holdings of land, and the tenants of these were bound to this duty by the terms of their tenure. It would not often be the large meetings of the county courts, summoned to meet the justices, that elected the knights; only forty days lay between the issue of the summoning writs and the meeting of Parliament; so it was usually the ordinary monthly meeting of the court, at which there was likely to be but a small attendance beyond those concerned in the cases to be tried. There would be no flocking to an election in which, in the nature of things, there could be no interest. Especially it is to be remembered that there were no villeins in the county court. Thus England's peasantry, about two-thirds of the population, had nothing to do with electing the county representatives and cannot be regarded as represented by them. When it was stated that the knights were to represent the "whole county" the context makes it quite clear that it was the county of the county court that was in mind.

As to the electoral process, one's mind is so filled by the modern paraphernalia of ballot-boxes or voting machines, election judges, accurate counts, majorities, and pluralities, that he is likely to forget that such things are the product of a very long evolution. These thirteenth and fourteenth century elections, which antedate party and interest and all consciousness of the value of the franchise, may seem unworthy to be reckoned popular elections at all. Yet modern popular elections are their lineal descendants. Names were probably proposed to the assembled court by the sheriff or other influential men of the county. If they met with approval, there was general acclamation and the election was complete. But some one might be bold enough to object; if his objections seemed valid and he could gain a backing, his point was made good and other names were proposed. It was thus only in the acclamation and in the right to dissent that the popular element consisted. And yet in theory—and this is very important—these elections were by the court; any member might propose names and any might dissent.

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[1] See above, pp. 361, 362, 364.

No one cared to take part in these elections, not only because there was little inspiration in electing people to places they did not want, but because wages had to be paid them. These became fixed under Edward II. at four shillings a day for the knights of the shire and two shillings for the burgesses.[1] Abstention from the election might be urged as an excuse for not sharing in the payment of the wages. Few were able to make good such a claim, but the possibility worked with other forces so to belittle the election that the sheriff often practically named the knights who were to be returned, and, when he had an object for doing so, he could usually manipulate the elections to suit himself.[2]

[1] By Elizabeth's time wages had ceased to be paid to the county members, though not legally abolished. But many boroughs continued to pay their representatives until the late seventeenth century. The amount paid varied in the later time. Since 1911 members of the House of Commons, who do not get salaries as ministers or other officials, receive £400 per year.

[2] In 1376 a petition was sent to the king by the Commons asking that the knights be chosen by the better folk of the shires and not by the sheriffs alone. The king replied that they were to be chosen by the whole county. This shows the continuance of the sheriffs' undue influence, but undoubtedly also indicates an increasing interest on the part of the people. As late as 1410, an act was passed restraining abuses by the sheriffs in the election returns. See A. and S., document 113.

In this condition the shire elections remained until the one thing which could cause change occurred. At the end of the fourteenth century, places in Parliament were less matters of indifference; hence more interest in electing men to those places and developments in the electoral process. There were two things in the reign of Richard II. that began to threaten the influence of the class of knights and esquires, the country gentlemen, the smaller landlords. The peasant agitations then culminating showed that there was a class below whose rights and power must be reckoned with, and the long war with France had resulted in increased power and arrogance of the great nobles. Livery and maintenance were beginning; the nobles returned from the continent with bands of followers whom they were loathe to dismiss; they often brought increased wealth, and always high-flown ideas of their superiority to the classes below them. They were the essence of the tawdry, decadent feudalism of the English and French courts of that time. The knights felt themselves in danger of being crushed between the upper and nether millstones. In Parliament they could make themselves felt; they could enact "statutes of labourers" on the one hand or join the king in his attempts to curb a grasping aristocracy on the other.[1] There is no evidence of such heightened interest on the part of the borough members.

This approach of king and Commons, or at least the knights of the shire, was one of the most striking features of Richard's reign. In fact the Commons, under the knights' lead, began to take the independent position between Lords and king which became characteristic in the fifteenth century. A new significance began to attach to their election to Parliament. Should the rising peasant class, whose interests they thought so contrary to theirs, or the insolent followers of the great nobles share in the county elections? From the end of Edward

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[1] See above, pp. 193, 204, note 1, 209. See also the Statute of Maintenance and Liveries, 1390; A. and S., document 96.

III.'s reign, there is evidence that numbers of people attended the elections who were not properly suitors to the county court. An act of 1406,[1] decreeing that knights be elected not only by suitors duly summoned to the court for the purpose of election but by all who might be present, appears so out of harmony with the more definitive legislation soon to follow and with what one would naturally expect from the Commons as to suggest an exceptional situation just at that time. The Commons had been bringing forward an unusual number of petitions looking towards an interference in the government and a limitation of the royal power—some of these perhaps at the suggestion of the Lords themselves. Possibly a temporary estrangement arose between king and Commons because of this, and was made use of by the Lords to carry through an act by which they hoped in the end to gain control of the lower house. If no restrictions were placed upon the county electorate, they might expect, by means of the votes of their retainers, not only to prevent the return of specially obnoxious knights, but possibly to compass the election of some of those retainers themselves.[2] But by 1413, the situation had changed. Henry IV. was dead and the new king and Commons were in harmony. A statute of that year decreed that knights elected to Parliament be resident at the time of election in the counties which chose them and that the electors be of the same county in which they voted.[3] This removed much that was dangerous in earlier practice and which was sanctioned by the act of 1406, but not all.

In 1430, was passed the famous disfranchising statute.[4] It leaves no doubt of the interest now taken in the county elections. The statute mentions great troops of people, residents of the county, who come to elections, and, by their presence, cause danger of "manslaughter, riots, batteries, and divisions"; and there is this significant clause: whereas the elections of knights

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[1] A. and S., document 111.

[2] Riess, *Wahlrecht*, pp. 87, 88.

[3] A. and S., document 115.

[4] *Ibid.*, document 121.

> have now of late been made by very great and excessive number of people . . . of which most part was by people of small substance, or of no value, whereof every of them pretended a voice equivalent, as to such elections to be made, with the most worthy knights and esquires.

In these words, confirmed by the disfranchising provision which follows, is perhaps the first recognition in English history of election as a political right.[1] After there had been a representative Parliament for nearly a hundred years, is first found this idea which, on the basis of modern notions of Parliament, one would have expected from the beginning. The disfranchising clause limited the electorate to residents of the county, "whereof every one of them shall have free tenement to the value of forty shillings by the year at the least above all charges." Then follows another statement of great significance:

> and such as have the greatest number of them that may expend forty shillings by the year and above, as afore is said, shall be returned by the sheriffs of every county, knights for the parliament

—a clear statement of the majority principle.[2] All the election writs in the remainder of Henry VI.'s reign repeated the provision. The statute of 1445, requiring county representatives to be of gentle birth, completed this important line of legislation. What the disfranchising statute meant is seen not only by the reflection that forty shillings of that time had the purchasing power of over £30 to-day,[1] but also that only freeholders could vote. A large and worthy class of people was kept from political rights for four hundred years; but the Commons were dealing with real dangers in the fifteenth century; they were fighting for political existence. It must be acknowledged that in the centuries following the forty-shilling freeholders exercised well the great power vested in them.[2]

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[1] Riess, *Wahlrecht*, p. 91. Yet even after 1430 this seems not a very lively idea when one reflects for how many centuries the franchise fixed by this statute was accepted almost without protest; and certainly representation in Parliament was not thought a privilege in the boroughs. In 1628 Milborne Port and Webley had petitioned " to be restored as ancient boroughs, on the ground that long discontinuance did not forfeit the right; and much curious learning was displayed in the arguments. . . . Whereupon it was held that such discontinuance could not involve loss or forfeiture, because this elective right was not a franchise in the nature of a possession or privilege, but of a service *pro bono publico*. The resolution of the committee, therefore, was the restoration to both boroughs of the right of returning members." Cited in Forster's *Sir John Eliot*, ii., 122. In 1628 they could speak of "elective right" and strive for it, but the earlier point of view was clearly in mind and was cleverly and successfully used in the argument.

[2] Riess (*ibid.*, pp. 91, 92) has regarded this as the first legal expression of the majority principle to be found in the middle ages. But surely it was in the Provisions of Oxford, 1258. The Chancellor was to swear that he would not do several specified things "without the assent of the great council or of the major part," that he will seal nothing contrary to the ordinance "made by the twenty-four, or by the major part." The

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guardians of castles were to surrender them only on the authority of the king expressed through the "honest men of the land elected as his council, or by the major part." The fifteen who were to be the king's council were to be confirmed by the "twenty-four or by the major part of them." And the king declared his adherence to that which his "counsellors, all or the greater part of them . . . have done and shall do. . . ." Stubbs, *Select Charters*, pp. 385–388, *passim*. A careful search would probably show many other expressions of the principle before 1430.

[1] When the discovery of precious metals in America made money of less value, the forty-shilling freehold did not stand for a high property qualification; but the copyholder or leaseholder could not vote no matter how much his land was worth. "The qualification, however, was broader than might appear at first glance, since the term freehold was applicable to many kinds of property. Annuities and rent charges issuing from freehold lands were considered sufficient qualification, if they were of 40s. value; dowers of wives and even pews in churches might also be considered freeholds." See further illustrations of curious freeholds and a general discussion of the British electoral system before the reforms, in Seymour and Frary, *How the World Votes*, i., ch. iv. These authors estimate that as late as 1831 there were "less than 250,000 county electors in England and Wales, and the proportion of county voters to population was probably not as high as one to thirty-five."

[2] In 1294 it had been suggested that no freeholder whose estate brought in less than 40s. per year could be made to serve on a jury in the county court (perhaps suggested by the 40s. limit recently placed on county court actions. See above, p. 184). This was to lessen the heavy burden of jury service. It was promptly acted upon to escape also the burden of suit of court, for by that date there was little reason to attend the court except jury service, and there were now very few cases in the county court in which juries were used. Hence thereafter the normal county court did not contain these poorer freeholders. The statute of 1430 merely placed the franchise in the normal, the legal, county court. For the lesser freeholders had so long used the privilege of staying away that now that it was a privilege to go, their presence could be regarded as illegal by force of prescription. This shows the statute of 1430 not the novel and reactionary measure sometimes represented, but, like most early statutes, declaratory of the law.

The subject of the electorate in the boroughs presents a serious problem at the outset. The usual writs of early times simply ordered the sheriffs to return so many citizens and burgesses from such cities and boroughs as lay in their respective counties.[1] It was not long, however, before certain cities and boroughs are found regularly represented in Parliament, while with others the right or rather the burden of representation had disappeared. So haphazard has the line between these two classes appeared that there has seemed to be no reasonable explanation of it. The main difficulty has been in attributing more value to borough representation than it then had either in the thought of the king or of the boroughs themselves. It has been thought that if in so weighty a matter as representation in Parliament some boroughs were represented while some were not, the central government must have had a weighty reason for making the distinction. But it was not a weighty matter; the king levied taxes upon the individual boroughs anyway;[2] and, if he found a respectable number of burgesses present, enough to give information and confer with him about his proposed taxes, the fact that the others had failed to come was a matter of indifference. The responsibility of dealing with the individual boroughs was left to the sheriffs, and there is little indication that penalties were imposed by the king upon the boroughs that failed to respond. To the boroughs representation was a burden, and there were several instances in which the king formally granted relief from it for specified reasons.

The growth of a recognized and rather small class of represented boroughs is to be explained through the relations between the sheriffs and the boroughs in their respective counties.[1] Some boroughs had become wholly independent of the hundreds in which they lay, not only in internal administration, which was true of all, but in external relations. In the matter of summons to Parliament, the sheriff dealt with such boroughs directly, not through the hundreds' officers. Dealing directly with so powerful a king's officer, these boroughs were the ones most regularly represented. In some of the distant counties, as Somerset, Devon, and Cornwall, the sheriffs adopted the same direct summons in the case of boroughs not independent of their hundreds and these were thus brought into the class of represented places. The reason for this was that when the sheriffs communicated with boroughs through the hundreds' bailiffs, there was a tedious procedure, subject to chances and interruptions, before the names of the chosen representatives were ready to be sent to the Chancery; and apparently in these distant counties, the addition of the long and slow journey from and to London made it impossible to get the returns in before Parliament convened. Hence here the sheriffs came to deal over the heads of the hundreds' bailiffs. A third class of boroughs lay in the great "liberties" (usually much larger than hundreds): these must be dealt with through the bailiffs of the "liberty." In this case, not even in the distant counties did the sheriff venture to disregard the mediumship of the bailiffs, and these boroughs, almost without exception, early ceased to be represented in Parliament. Thus the boroughs dealt with through the minor officials found it easier to dodge the disagreeable duty. It may seem a trifling matter to have produced so marked a distinction among the boroughs of England, in the course of time the source of marked political results; but in the early years of an institution, when everything is in flux and small importance is attached to the beginnings of things really great, petty and obscure influences may play a great rôle.[1] There was a general decline in the number of boroughs receiving the summons from the one hundred and sixty-six of Edward I.'s day to about 1445 when only ninety-nine were summoned. Then there was a slow turning of the tide; eight new boroughs were added later in Henry VI.'s reign, and Edward IV. added or restored five. Under the later Tudors there was a rather rapid increase. But there is much evidence that there was a tremendous gap between the number of boroughs receiving the summons and nominally returning members and the number of burgesses actually present at a session in Westminster. A careful study of the expense records indicates that in many, perhaps most, Parliaments of the fourteenth and fifteenth centuries the number of burgesses fell below the stable seventy-four knights always present for the thirty-seven shires. Thus it was not alone in status and influence that the knights were above the burgesses in the early Commons, but in numbers also.[2]

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[1] Simon de Montfort dealt with the boroughs directly, and the same thing was done in one or two instances in the reign of Edward I., but it soon became the rule to deal with them through the sheriffs.

[2] When the tax known as the *tenth and fifteenth* became fixed in character early in the fourteenth century (see below, pp. 403, 404), the boroughs appear to have had a special reason to escape representation if possible. The represented boroughs paid the tenth, the rate fixed for urban property, while the unrepresented boroughs paid the fifteenth of the rural districts. And of course the boroughs which escaped representation escaped payment of wages to representatives.

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[1] Of course the really big towns of the south must always return members, and the same was true of the cathedral cities.

The sheriff had about as much opportunity to manipulate borough as county representation. The writ ordering the election passed through his hands and he might be induced not to send it. Such suppression of writs seems to have occurred occasionally in the last half of the fourteenth century and later, when the list of boroughs that commonly sent representatives had become quite fixed.[3] Moreover, it was possible for the sheriff, since the names of the borough members had to be returned through him together with the results of the shire elections, to change the names. This left the boroughs quite powerless since the Chancery did not ordinarily go back of the sheriff's returns. There was no reason for this abuse until seats in Parliament were regarded as worth something. It was somewhat lessened through the peti-

[1] For a full discussion of this subject, see Riess, *Wahlrecht*, ch. ii.

[2] Pollard, *Evolution of Parliament*, pp. 316–319.

[3] A statute of 1382 provided for the punishment of sheriffs who omitted boroughs that had before sent members.

tions of individual boroughs or actions originating in the House of Commons, and also by the new charters of incorporation granted to some boroughs; these virtually placed the electorate in oligarchies which carefully guarded their rights and created a greater *esprit de corps.*[1] By the end of the fifteenth century, about eighteen important boroughs had been granted the organization of shires with sheriffs of their own.[2]

The variety of borough governments, the slight intercommunication, and the small value set upon representation in Parliament resulted in lack of uniformity in the matter of election. The sheriff sent to the borough's bailiffs a copy of the writ received from the king requiring that borough to send two representatives to the ensuing Parliament. Ordinarily the choice was then made in one of three ways depending upon the kind of government the borough had developed: the bailiffs themselves made the choice; they called a meeting of the most important burgesses and consulted them in the matter; they called a general meeting of the burgesses, in which case the election was conducted much as it was in the county courts, with a real, if slight, popular element in it.[3] The bailiffs sent the result to the sheriff, who included it in his statement of the county election which was sent to the Chancery.[1] Till the Tudor period the boroughs returned residents or "neighboring gentlemen whom they regarded with respect"; but the Tudors' attempts to control elections developed the practice of electing at times men in distant parts of the country.

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[1] As a rule the later the charter the more aristocratic was the borough organisation. Here is seen the beginning of the small, close corporations which came to control so many boroughs and in which the right of election to Parliament was vested. These corporations perpetuated themselves by co-option and often came to be controlled by some great noble who by purchasing property in the borough practically bought the right to name its representatives in Parliament.

[2] London had become a county back in the reign of Henry I. The next was not until 1373; this was Bristol. Then York in 1396. There followed Newcastle, Norwich, Lincoln, Hull, Southampton, Nottingham, Coventry, Canterbury. In some of the boroughs that became counties the 40s. freehold qualification for the franchise was adopted.

[3] Probably the last way was the commonest in the early years of Parliament, but the tendency was away from anything like popular election. It was generally looked on as a burden and not a right. In some boroughs in the middle ages various devices for secrecy in connection with voting were tried; these became commoner under the Tudors, when also ballot voting was not uncommon. But all this was in connection with electing town officers, almost always the mayor. Here there was competition and intense interest. With one possible exception nothing of the sort has been found in connection with parliamentary elections. See Gross, *The Early History of the Ballot in England*, American Historical Review, iii., 456–463.

7. **Origin of the Chief Powers of Parliament: Control over Taxation; Legislation; a Share in Administration.**—What has already been said of the functions of the representative elements in the early Parliament has shown them narrow and subordinate. The Commons were present to vote taxes—which, paradoxical as it may seem, did not imply the right to refuse them; to petition humbly; to answer questions. The almost servile part played by the third estate in the French Estates General of the same period was not unlike that of the corresponding element in the English assembly. To be sure, the knights of the shire, from their antecedents and local influence, were accorded more consideration than the burgesses, and in the union of these elements lay the greatest possibilities. But it was all possibility at the beginning of the fourteenth century, and we turn now from the study of its structural beginnings to see how Parliament grew conscious of itself as something apart from the king and started on the road to power; how it became an institution fitted some day to gain or uphold the principles of constitutional monarchy. Only the beginning of the development is dealt with here, substantially what was included in the fourteenth century; but in that period nearly all Parliament's activities were outlined.

A preliminary consideration is to account for the early remarkable vitality of Parliament. In order that Parliament should gain power of any sort, there must be reasonably frequent meetings; the more frequent they were in the early days, the more rapidly would grow the esteem in which the institution was held. A new institution is easily killed by adverse circumstances, by long interruptions. It was of prime importance in Parliament's early history that there were almost yearly sessions. The battle of an institution is half won when it has become to the popular mind something regular and necessary.

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[1] On the general subject of the borough franchise, see Riess, *Wahlrecht*, pp. 59–62.

Two things account for this early vigor: first, Parliament was the country's high court, and as such had much and important judicial business; second, the political history of the fourteenth century was of just the sort to make such an assembly indispensable. When Henry II. in 1178 created the Bench,[1] he decreed that any matter which was too hard for these five justices should be reserved for the royal audience. But this did not mean, as Henry made clear, that he was to decide it himself alone, but that it was to come to him in his court, in that body of royal counsellors, small or large, which with him was the highest power in the realm. In the course of the thirteenth century this more ample judicial authority is sometimes seen in that body of justices which do justice *coram rege*, and which finally became a court of prescribed powers, the king's Bench; sometimes in the whole body of baronial or other counsellors, including justices, which surround the king, the thing which we begin to call the king's Council—and this seems higher; sometimes in the summoned body of great barons which swallows up the Council for the time being and meets more often on the great church festivals—and this seems highest of all. There is no hierarchy of courts here in which there is appeal from court to court, but the last is the highest in that it includes the others and no doubt the most difficult points were kept for it. But this summoned meeting of barons, in which there was much parleying as well as judging, began to be called *parliament* at least as early as 1239, and the name stuck and finally displaced the older ones. Now sometimes when representative knights or burgesses were gathered by the king they appeared before the Council, the body always in session, but sometimes before the larger summoned council, before a parliament[1]—sometimes before or with this body when it was talking over some political matter with the king, like taxation,[2] sometimes when it was holding one of its more routine sessions and judicial matters were uppermost. From 1298 on this last was the most common; the short sojourn of knights and burgesses in Westminster at least partly overlapped in time with, and had some other connection with, the high court of parliament. Indeed if the commons were to meet at all with the great council or parliament, it would normally be at judicial sessions, for most sessions were judicial. "The Rolls of Parliament show that a larger part of the work of the 'Parliament' was what we should call 'judicial,' consisting of those cases that had proved too hard or too novel for the judges in the separate courts." As this kind of work did not seem appropriate, traditionally or otherwise, for the commons, it was the general practice that "the cases were settled before these came to give their advice or their money, or were left until they had gone home again."[3] But the point of importance here is that more and more it was the practice, when knights and burgesses were summoned, to unite them for a part of the session at least with the "parliament" in one of its ordinary meetings; and that when, as was bound to happen, all these together were thought of as one assembly and the name parliament had spread over them all, the resulting Parliament of the fourteenth and fifteenth centuries had all the life and vigor that its judicial work was bound to carry with it.[4]

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[1] See above, p. 177.

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[1] Examples can be noted above, pp. 360–362, 364.

[2] The so-called Model Parliament of 1295 is an instance.

[3] McIlwain, *High Court of Parliament*, p. 25.

[4] Professor Pollard places great stress upon this point. "It was to a high court of law and justice that the taxing and representative factors of parliament were wedded; and it was this union that gave the English parliament its strength. Its absence, the divorce between French *parle-*

But if there had not been substantial political reasons for the frequent summons of representatives and if English knights had not formed a kind of natural bridge or means of approach between barons and burgesses, it is hard to see how this union with "parliament" could have become a habit, with the resulting single-assembly idea. The misrule and inefficiency of Edward II. caused local oppressions and a demand for frequent meetings of the body in which complaints might be made and remedies sought. An article in the New Ordinances of 1311 says:

> Inasmuch as many people are oppressed by the king's ministers, . . . and for such oppressions can find no remedy, save through the common parliament: we do ordain, that the king shall hold a parliament once in the year, or twice, if need be, and that in a convenient place.

This was a baronial scheme and no more may have been meant by "parliament" than the great council, and yet the representatives of shires and boroughs would have been the natural bearers of mass petitions about the "oppressions." In 1322, when the Ordinances were revoked under the leadership of the Despensers, these royal favourites found it convenient, on personal grounds, in taking their stand against the barons, to proclaim a principle, which surely did not represent the practice or even the general theory of the time, but the statement of which must have had its importance:

> but the matters which are to be established for the estate of our lord the king and of his heirs, and for the estate of the

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ments and estates, was fatal to orderly constitutional development in France." It was the "judicial functions which made parliament the highest law court in the land and gave it a framework and organisation strong enough to save it from the shipwreck that overtook mere representative bodies everywhere else." *Evolution of Parliament*, pp. 43, 55. But this does not tell the whole story, much as we owe Professor Pollard for his vigorous emphasis and clear statement,—as there is a slight attempt to show in the text. The comparative constitutional history of England and France is largely an unworked field.

realm and of the people, shall be treated, accorded, and established in parliaments, by our lord the king, and by the assent of the prelates, earls, and barons, and the commonalty of the realm; according as it hath been heretofore accustomed.[1]

There is no doubt that "parliament" here was used as including knights and burgesses. Early in the next reign, 1330, while local abuses were still grievous, and, from the context of the clause, because of them, again is found the enactment "that a parliament shall be holden every year once, or more often if need be."[2] Then began the great drama of Edward III.'s reign, a war drama from beginning to end, a reign of fifty years, during which there was constant and unusual need of money. Taxes must be negotiated through Parliament, and the letter of the statutory requirement of 1330 was almost kept, for there were forty-eight Parliaments in fifty years. The late years of this reign and the whole of the following were another period of factional strife, and there has already been noted the importance in the history of the commons of Richard II.'s intrigues with them against the lords.[3] Thus for a full century after 1295 there were political reasons for many Parliaments—Parliaments which contained commons as well as lords.[4]

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[1] A. and S., p. 97. Possibly it was the intention to express the same idea earlier in Edward II.'s coronation oath. "Sir, do you grant to hold and keep the laws and righteous customs which the community of your realm shall have chosen (*quas vulgus elegerit—les quiels la communauté de vostre roiaume aura esleu*), and will you defend and strengthen them to the honour of God and to the utmost of your power? I grant and promise." See Maitland, *C. H. E.*, pp. 99, 100.

[2] A. and S., p. 101. This was confirmed in 1362: "For redress of divers mischiefs and grievances which daily happen a Parliament shall be holden every year, as another time was ordained by statute." Cited in Taswell-Langmead, *English Constitutional History*, p. 251.

[3] See above, pp. 388, 389.

[4] "There were no parliaments in 1364, 1367, 1370, between 1373–6, 1387, 1389, 1392, 1396, or between 1407–10. On the other hand in a considerable number of years there were two parliaments, in 1340 there were three, in 1328 four." Maitland, *C. H. E.*, p. 178. In connection with these very frequent Parliaments it must also be remembered that there were no permanent taxes. Taxes were granted usually for a single occa-

The knights of the shire and the burgesses were from the start conscious of the financial purpose which drew them to Parliament. Especially was this purpose emphasised by the circumstances which attended the summons of the Model Parliament and the events of the two succeeding years. Parliament was a taxing body from the first. It was natural then that the first great contest with the king should have been financial and that the first power to be developed should have been control over taxation. Conscious control of taxation was the basis of all that Parliament came to do in government which lay outside of the royal initiative. Something must be said next of the development of the taxing idea since early post-Conquest times and the circumstances of Parliament's assertion of control in the reign of Edward III.

A.—When the king got together the different estates in Parliament and taxes were dealt with, it was evidently upon the assumption that taxation was a thing in which all classes were concerned, a national taxation. It has been shown that for a considerable time after the Norman Conquest there was no understanding of taxation in the modern sense.[1] The king had various sources of revenue and means of supplying the needs of government, but his attention was fixed upon classes of men. Each class had a specialty, in some cases based upon private contract or proprietary relations, for supplying the royal needs. The king made his demands upon this, that, and the other class of the population as opportunity dictated and upon this, that, and the other different ground. Although the action of later kings, such as John and Henry III., tended toward the transmuting of these old grounds into a public obligation, yet the system gradually passed into disuse

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sion, or at most in a few instances for two or three years. There was a change in this respect in the fifteenth century through the development of the tunnage and poundage taxes. See below, pp. 406, 427.

[1] S. K. Mitchell, *Taxation Under John and Henry III.*, p. 2. This is an important authority on taxation in the pre-Parliamentary period.

as feudal ideas waned, and out of it national taxation did not grow. National taxation is characterised by fixing the attention upon kinds of property rather than upon classes of men, by taxing at one time all of a certain kind of property irrespective of who holds it. Its scope is the nation, not the class, and its basis was public, not private.

The added expense of Henry II.'s governmental machinery, foreign wars, the third crusade, Richard's ransom, and a gradual rise in prices from about 1190 to the middle of the next century created a situation which demanded new sources of revenue as well as the development of old ones. The Danegeld,[1] which, as far as it went, had been essentially a national tax, disappeared under its old name early in Henry II.'s reign, but something like it was levied occasionally throughout his life. In 1194, however, a new basis of assessment for the land tax came into use, the carucate or ploughland of one hundred acres. The tax levied on the carucate was known as *carucage* and was first used in connection with Richard's ransom. It was again levied in 1198, when an elaborate new assessment by the jury method was undertaken. Carucage was a national tax, it was not limited to men of a class; and in the next century it was important, but that particular method of reaching land through taxation did not last beyond the reign of Henry III. How large a part in the origin of taxation was played by the Crusades and the popes as their managers is coming to be well understood. The situation in the East constituted a need international and pressing, in meeting which the state was ready to co-operate with the church; and feudalism, fitted for local undertakings, was found wanting. In 1166 the first tax in England on personal property as such, a tax of sixpence in the pound, was levied for the relief of the Holy Land. The management of the third Crusade was openly undertaken by the church, and money was to be raised by a tax on revenue and movables. This was the famous Saladin Tithe.[1] An ordinance of 1188 imposed it upon England; the first clause reads, "Every one shall this year give in alms a tenth of his revenue and movables." This new scheme for raising money was not likely to be lost sight of in such a reign as Richard I.'s; and when his great ransom was raised it was used for the first time in a domestic concern, and at a higher rate. From this time, the tax was levied with more or less frequency and at greatly varying rates; and the difficulty in assessing personal property and income was met by the use of juries of neighbours that has been noted as so important in leading to the origin of representation in Parliament.[2] At first some account was taken of the different classes of people, as clergy, barons, knights of the shire, burgesses; but partly owing to the union of the last two elements in Parliament and partly as a result of the inherent necessities of such a tax,

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[1] See above, pp. 119, 120.

the old distinction between Estates gave way to a new distinction based on the difference between town and country, or, roughly, between real and personal property; and while the ordinary proportion granted for dwellers outside a chartered town was one-fifteenth, one-tenth was the settled share of inhabitants of a parliamentary borough.[3]

After 1332, because it was felt that this tax was being excessively levied and because of the charge of corrupt practices in connection with the 1332 assessment, it was really decreased by allowing no new assessment of the old type. In 1334, as a result of negotiations and agreements between the collectors and the townships and boroughs, a sum of about £38,000 was raised. After that this sum was taken as a fixed charge and, properly proportioned between town and country and with but slight variation from time to time to meet a special exemption or take account of some local calamity, was known as the *tenth and fifteenth.*[1] With carucage and the tax on movables

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[1] A. and S., document 19; W. and N., pp. 91, 92.

[2] See above, p. 352.

[3] Medley, *English Constitutional History*, p. 550. Boroughs and counties had not necessarily been taxed at the same time; the tenth had sometimes been levied at one time and the fifteenth at another. On the taxing of the non-Parliamentary boroughs, see above, p. 392 and note 2.

modern taxes began. In the first place, the basis of these levies was property not tenure; men paid directly to the king, no matter of whom they held or by what tenure. In the second place, though the members of the council which granted these aids may have thought that each acted for himself, individually, yet the result of the deliberations was to create a uniform tax, proportional to the amount of property. Finally, the machinery of assessment and collection was new (in taxation) and was national, not feudal.[2]

Perhaps the most notable development in this connection in the thirteenth century was the growth of corporate action on the part of the great council. In dealing in money matters with such a king as Henry III. the barons learned over and over again the lesson which had first become plain to them in the drive for Magna Carta, that in union there was strength. In the twelve-forties particularly we note the rapidly growing use of such words as *communitas* and *universitas* and the development of stock phrases denoting united action. Baronial as the great council was it more and more spoke as if it were speaking for the nation, and it was rapidly learning to drive a bargain with a shifty king and to attempt the control of the expenditure as well as the granting of money. Indeed out of the feudal notion that the lord could not take an unusual aid from his vassals without their consent was emerging the notion that the nation could not be taxed without its consent; and the baronial assembly curiously pictured itself as consenting or dissenting for the nation. Much in the parliamentary experience of the fourteenth century, when the nation was in a sort represented, was anticipated in the baronial dealings with Henry III.

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[1] J. F. Willard, *The Taxes upon Movables of the Reign of Edward III.*, English Historical Review, xxx., pp. 69–74. For a discussion of the older method of assessment, see Professor Willard's *The Assessment of Lay Subsidies, 1290–1332*, Annual Report of the American Historical Association for the year 1917, pp. 283–292.

[2] S. K. Mitchell, *Taxation under John and Henry III.*, pp. 351, 352.

Indirect taxes, in the form of customs duties, had a very obscure and fitful beginning and until the reign of Edward I. played no important part in political action or thought. But undoubtedly they antedate the taxes on movables. They seem to have originated at the royal initiative and to have been suggested by the very many local customs or tolls of the towns or fairs. They were used by kings in the twelfth century, were on both exports and imports, and were most of them short-lived. They fell a prey to the localism from whence they sprang; that is, they were eaten into by exemptions in the case of towns favoured as a result of influential lords or the payment of money, and they often passed into the hands of private nobles through infeudation.[1] For a time in the reign of John a more thoroughgoing attempt was made to meet the mounting cost of war, and a fifteenth, an ad valorem duty on exports and imports, was levied. Then for a half century, little or nothing is heard of this sort of thing, when the "new aid" of 1266, an ad valorem tax on foreign trade, was instituted. The rate of this is not known; neither is it known whether or not it lasted till 1275, the year in which was laid the "corner stone of the later customs system." This was the "ancient custom" granted by the first Parliament of 1275, and was

> half a mark from each sack of wool and half a mark from each three hundred woolfells which make a sack and a mark

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[1] Some of these may date back to the Anglo-Saxon period, but their antiquity is uncertain. The more prominent appear under the names of *lastage* (on exports) and *scavage* (on imports). See above, p. 51, note 1. For a discussion of this subject, see N. S. B. Gras, *English Customs Revenue up to 1275*, Annual Report of the American Historical Association for the Year 1917, pp. 295–301.

from each last of hides[1] that issue from the realm as well in Ireland and Wales as in England.

This became the legal "ancient" custom or toll and any higher rate which the king might seek to levy was called a *maltote*, an evil toll. Wool and hides were the great English exports and such was the demand for them in continental markets that England was long able to tax these exports. Indeed in the matter of wool production England had no real competitor except Spain; England and Spain sold to the same market and yet a high export duty was possible. The New Custom of 1303, besides new and increased export duties, contained regulations of far-reaching importance in the matter of import duties. The New Custom dealt only with alien merchants resident in England, granting them extensive trading privileges in return for the duties, but two of these, 2s. per tun on imported wine and 3d. per £ value on most other imports and many exports, served as models or prototypes of the later well-known subsidy of *tunnage and poundage*, paid by both denizens and aliens, and which in 1373 took the general form which was to last for centuries.[2] It has often been said that the import duties arose from the king's ancient right to regulate trade with foreign countries and the export duties from his right to tax movables, their passing out of the country affording a favorable opportunity to assess certain kinds of movables. But export duties certainly preceded any general tax on movables, and these legalistic theories, though playing a part in later political thought, appear to have followed an accomplished fact.

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[1] That is, cowhides. A last was a bundle of 200 hides. A mark was 13s. 4d.

[2] In 1373, *tunnage and poundage* was a tax of 2s. per tun on imported wine and 6d. per £ on general merchandise, imported or exported; but with certain exemptions, the most important being exported wool and hides, the duty on which of course had its special rates and history. In *tunnage and poundage* "the chief developments following this were the increase of the rate, the granting of the subsidy for the life of the king, and the exemption of certain commodities from the tax." Gras, *Early English Customs*, p. 82.

In general, war has been the necessity that fathered taxation. With the exception of the resistance to the Danish invasions, the wars of the Anglo-Saxon period were petty. Those invasions resulted first in a wider and more regular enforcement of the *trinoda necessitas*, and finally brought forth the Danegeld. The Norman dukes had fought at no great distances, and feudalism served the military requirements of the duchy fairly well. After the Conquest, one of the most important roots of taxation and of resistance to taxation in England was the attempt to make feudal service extend across the Channel. Hence in the early protests the nobility naturally took the lead.[1] But the income and personal property taxes, also the offspring of war, were being more and more used. All classes were concerned in these; and as the indirect taxes were developed during the thirteenth century, and gained recognition in the reign of Edward I., powerful special interests became involved in the problem of taxation. In the struggle of 1297, the great nobles still led, but all classes were more concerned than in any preceding conflict and were learning the lesson of resistance to taxation as they could not in 1215. Thus, just as Parliament was coming into existence, the people of England were learning that they could and must control the king's taxing power.

The vital promises made by the king in Confirmatio Cartarum[2] read:

> Moreover, we have granted for us and our heirs, as well to archbishops, bishops, abbots, priors, and other folk of holy Church, as also to earls, barons, and to all the community of the land, that for no business from henceforth shall we take such manner of aids, mises, nor prises,[3] from our realm,

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[1] For a discussion of the relation of feudal service to taxation, see above, p. 120.

[2] A. and S., document 48; W. and N., pp. 396–398.

[3] These terms, of which it is dangerous to venture a technical rendering, have the general meaning of "aids, exactions, nor seizures," "seizures" either equalling or including purveyance. See above, p. 51. There had been an attempt to regulate purveyance in Magna Carta, article 28.

> but by the common assent of all the realm, and for the common profit thereof, saving the ancient aids and prises due and accustomed.
>
> And for so much as the more part of the community of the realm find themselves sore grieved with the maletote on wools, that is to wit, a toll of forty shillings for every sack of wool, and have made petition to us to release the same; we, at their requests, have fully released it, and have granted that we shall never take this nor any other without their common assent and good-will; saving to us and our heirs the custom of wool, woolfells, and hides granted before by the community aforesaid.

It is interesting to note the somewhat grudging mention of the commons' right to consent to taxation, and that in the excepted "ancient aids" they had never had any share, and hence, as far as this law was concerned, would not in the future. One is reminded that, despite the changes of the thirteenth century, the revolt of 1297 was much a barons' affair, and that the difference in spirit between this provision and the long-omitted article twelve of Magna Carta, which it really replaced, was not as great as has often been represented. The commons were upon the brink of obtaining a great right in 1297 rather than in possession of it.

The language of Confirmatio was loose, and the kings, even Edward I., were quick to see and use the loop-holes which it afforded them. It was without doubt the intention, under the words *aids*, *mises*, and *prises*, together

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It is interesting to compare this language with that of the document known as De Tallagio non Concedendo. This was probably an unofficial statement of the demands of the discontented elements and is found in the chronicle of Walter of Hemingburgh; it was mistaken for a statute in later centuries and was cited as such in the Petition of Right (A. and S., document 189; W. and N., pp. 398–403). Its first article reads: "No tallage or aid shall be laid or levied by us or our heirs in our realm, without the good will and assent of the archbishops, bishops, earls, barons, knights, burgesses, and other freemen of our realm." Here was a statement without qualifying words and which expressly mentioned the individual elements of the commonalty as well as of the nobility. The use of the word tallage, however, is strange and must have been the result of carelessness, for to the people of that time tallage was no general tax, but the king's right as overlord to take money from his domain towns. See above, pp. 122, 123.

with the succeeding article dealing with the customs duties, to include both direct and indirect taxation. But the kings presumed themselves permitted, without consulting anyone, to levy the regular feudal aids and scutage, to tallage their domain towns, and to dodge the customs article by entering into private negotiations with merchants, especially alien merchants who would be in no wise covered by Confirmatio. These merchants were granted valuable privileges in return for the increased duties which they agreed to pay.[1] This veiling of a tax under the form of a private bargain, in which, however, one of the parties had small chance of dealing on an equality, was the most important of these subterfuges; for the export of wool, comparatively small before this, was growing with great rapidity. Feudal aids, scutage, and tallage of the royal domain were already antiquated, played little part in the coming conflict, and were of no consequence after the three Edwards.[2]

The first real issue was upon indirect taxation. The Commons, conscious that they were not strong enough absolutely to prohibit the king's breaking the letter or the spirit of the customs article, adopted the device of formally voting the money for which he had arranged and would obtain anyway. They thus tacitly asserted the principle that no money grants could be made without their consent. The king made no objection to this assumption of authority, provided he got the money; but Parliament must have had a dawning perception that such repeated assertion of principle was bound to bear fruit. Edward III., under the pressure of the new war with France, showed, in 1340, his intention to levy a generally increased custom on wool and hides, similar to the *maltote* of his grandfather. Parliament, to prevent the arbitrary action, made a regular grant of the custom to be in force for a specified time, and containing a provision that after the expiration of that time no custom, beyond the ancient custom, that is, the one established in 1275, should again be levied. This was almost immediately followed by a statute which contained a broader prohibitive provision. Referring especially to a large subsidy granted at the same time that the increased tariff had been arranged, it stated that the people should not

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[1] Purveyance, Commissions of Array, and Distraint of Knighthood were minor forms of indirect taxation retained by the king for a considerable time. See Medley, *English Constitutional History*, p. 256. Legislation against purveyance began with Magna Carta and continued to the end of the middle ages, with but partially satisfactory results.

[2] Edward I. tallaged the demesne in 1304, Edward II. in 1312, Edward III. in 1332. But Parliament remonstrated with the king on this last occasion and he abandoned the undertaking. Apparently this was the last attempt to tallage. The amount of the aids became fixed by statute in 1350, the same for the king as for other lords; and scutage was decadent. By the middle of the fourteenth century the king's arbitrary power in connection with these old levies was at an end.

> be from henceforth charged nor grieved to make common aid or to sustain charge, if it be not by the common assent of the prelates, earls, barons, and other great men, and commons of our said realm of England, and that in the Parliament.[1]

This was a reassertion, after nearly half a century of intermittent conflict, of the principle of 1297, and the added clause respecting Parliament is very significant. That Parliament was strong enough to gain this acknowledgment from Edward III. indicates that the victory was practically won, the principle of parliamentary control of taxation established. Scarcely ever after was it called in question; the energy and ingenuity of kings was expended rather in dodging it. The date 1340 is, therefore, a most important one in the growth of Parliament's power. An act of 1362, confirmed in 1371, to the effect that no one, without the consent of Parliament, could negotiate any charge upon wool, seems to have brought to an end the private dealings with merchants.[2] However, the results of those dealings, having passed into custom, continued to advantage the king, and the *maltote*, so resisted in 1340, became a regular charge upon wool through parliamentary action before the end of the reign.[1] It seems to have been the earlier idea that clergy, Lords, and Commons should make their money grants separately. In a way this remained true of the clergy, who granted money in Convocation; but the Commons really controlled, for Convocation became bound by custom to grant at the same time and proportionately with Parliament. By the end of the fourteenth century Lords and Commons were making their grants together, and the Commons, who bore the real burden of taxation, were coming into the foreground—according to the formula which came into use in 1395, the grant was made by the Commons with the assent of the Lords.[2]

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[1] A. and S., document 59.

[2] For a specific instance of resistance to such dealings, 1343, see A. and S., document 65. The Ordinance of the Staples, 1353, shows something of the "merchants strangers" and of the rate of the customs duties in that year; *ibid.*, document 74.

B.—In connection with the *dooms* which king and witan made in the Anglo-Saxon period, it has been remarked[3] that the use of this word shows that there was in mind no distinction between a court judgment and this act, which, lacking a better term, we call legislation; both were to them the utterance of existing *law*, a thing immemorial, fundamental, not makable. There had been remarkably little change in this notion of law and legislation down to the fourteenth century. William the Conqueror's "laws" were administrative adaptations of existing law; while under Henry II. there were laws "made," as we must say, which were in origin administrative directions with no formality of intention, or being in the realm of procedure, as were many of his assizes, were not thought of as touching the realm of law at all. If the king were strong enough and wise enough he might thus powerfully legislate without knowing it. When the king did this sort of thing, he ordinarily acted through his court, his council small or large—and his court was, more than anything else, a court of law. The king sought counsel and information, but he was not dealing with a national assembly standing over against him and representing another interest. When the barons resisted the king, they did it individually or in groups with force of arms, they did it as a feudal nobility; they did not fight out issues in parliamentary manner in an assembly. When the king acted formally it was through his court; it was the king in action.

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[1] Parliament was bound in time to recognise that the so-called *maltote* was not an exorbitant charge.

[2] See below, pp. 429, 430.

[3] See above, p. 55 and note 1.

During the thirteenth century, the oneness of king and court—especially in the form of the great council—was less marked than before. The union of barons at Runnymede and the constant call for united action against Henry III. could not but be reflected in the temper and work of the great council, and to us there seems to have been the beginning, though of course unrecognized at the time, of some law-declaring authority outside the king. Something has already been said[1] of the curious and changing "legislation" of the thirteenth century and the early uses of the word statute, but here, where attention is more centered upon a developing assembly, it should be emphasized that some slight distinction was being made between a routine applying of law and an application which had such novelty in it as to imply change. In the latter case the consent of the barons was more and more felt to be necessary. When representatives of counties and boroughs were being added to the great council an element of confusion was introduced so great as to do violence to any theory—had a theory really existed. The king might get information, advice, consent from any element of his people thus brought to the center, and the ordinance, or whatever one may choose to call it, based upon this action, was enforcible. But this constituted no recognition of a right on the part of these elements to a share in legislation. There was no idea of legislation as a right to be sought or shared. Indeed legislation as an act of government distinguishable from judicial or administrative action was not thought of. These powers of government, as we regard them, were then one, an undifferentiated power. But it is permissible, indeed necessary, in tracing governmental growth, to label and classify individual exercises of this power according to which aspect—judicial, legislative, administrative—appears uppermost. The "statutes" of Edward I.'s reign appear distinctly legislative acts; in view of most governmental work in the two following centuries they were prematurely such. But they imply no new source of law-declaring power. Quia Emptores, 1290, relating to a subject of special interest to the barons, was declared by the king in his council, while the Statute of Merchants followed a consultation with the burgesses alone, and in both cases the introductory formula was ancient and the same. Yet the statute rolls began in this reign; the king or someone in authority felt that there were acts important and unusual to record, acts appropriately grouped under the descriptive word *statuta*, things established or fixed. Yet whether or not reflected in formula or recognized as a general principle, the idea was fitfully present that we have glimpsed early in the thirteenth century, that in the more formal declarations of law it was necessary for the king to have a somewhat general consent or backing. We see this in the coronation oath of Edward II., and most distinctly in the document revoking the New Ordinances, 1322. The important clause, already quoted in another connection, must be repeated here:

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[1] See above, pp. 237-240.

> . . . but matters which are to be established for the estate of our lord the king and of his heirs, and for the estate of the realm and of the people, shall be treated, accorded, and established in parliaments, by our lord the king, and by the assent of the prelates, earls, and barons, and the commonalty of the realm; according as it hath been heretofore accustomed.[1]

[1] A. and S., p. 97. See above, pp. 399, 400.

This was perhaps a bit of political theorising by the antibaronial party. But it is significant that such a theory could have been formulated. Supposing, however, this theory to have become realised most perfectly, it could still only have meant that the king had to obtain the consent of Parliament to measures he himself proposed; there was nothing in it to interfere with the monopoly of initiating measures which he had always possessed. No assembly can progress at all hopefully in the direction of any kind of legislative activity that is to give it an independent position in the state unless it has the means and the power to introduce measures of its own. To understand how the English Parliament gained these another side of its early history must be examined.

As the knights and burgesses began to sit more regularly, for part of the session at least, with the great council, now usually called a parliament, it was as a rule in a session of parliament when that body performed its regular duties as a high court.[1] This judicial side of the work continued and has never wholly passed away. This work came to Parliament in the form of petitions. These petitions were received without charge and were of the most varied sort, most of them from individuals. Many of them alleged the law's delay or stated some other burden or disadvantage under which the petitioner found himself; some of them were because the Chancellor could not issue a new writ which the case seemed to demand or presented some other phase of novelty or difficulty. These petitions came first to the "receivers and triers" who were often appointed in advance of a session of Parliament. The receivers were clerks whose work was merely mechanical; the triers were judges plus, ordinarily, some earls and barons. The triers dealt finally with many petitions, sending them to the ordinary courts where they belonged, which was a virtual rejection, sending them to the courts with an order for some special treatment, often an order which brought a dilatory procedure to a swift close, later many to the Court of Chancery, and in the case of the more difficult bringing them to Council or Parliament—the triers themselves, of course, being a part of the Council, and the Council of the great council or Parliament. Whether or not the Commons ever really shared in this more routine work of the High Court of Parliament it is impossible to say. It was a work that declined as the developing court of Chancery and later the Star Chamber drew large parts of it away. And yet it has been estimated that as late as the end of the middle ages nearly half the work of Parliament was judicial. However from the early fourteenth century this phase of Parliament's work decreased while something else increased. It grew less as a court, it grew more as a political body; the judicial aspect waned, the legislative became more prominent. But to see this we must return to petitions.

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[1] See above, pp. 397, 398.

The right of every subject to petition the sovereign had always existed. Early petitions may be divided roughly into two classes: most petitions, as later, came from individuals or very small groups and dealt with individuals' wrongs and came to the king and his court, either as the small or great council; but occasionally there had been petitions, or perhaps remonstrances, presented by large bodies of men acting together and dealing with matters of quite general concern. Such had been the barons' articles upon which Magna Carta was based, the petition of 1258 which resulted in the Provisions of Oxford; and the Confirmatio of 1297, with its all-important added articles on taxation, came from a petition of just this type and may be regarded as a sort of crowning pre-Parliamentary instance. These movements had resulted in documents, most notable and influential documents, but hard to classify. In the fourteenth and fifteenth centuries the individuals' petitions were dealt with by triers and Parliaments as stated above. They were in the judicial field, they were matters of private law. The common petitions, after knights and burgesses were regularly in Parliament, would naturally arise there. Parliament was representative, it was often enough in session, it was fitted to express public sentiment, it could replace the irregular and revolutionary risings which had been the only means of voicing general grievances. These petitions were rather in the realm of public law, they were political.[1]

The growth of the common petition was the natural result of the collection of knights and burgesses in a common gathering at Westminster and of the collective answer the crown required to its requests for money. Members from divers constituencies could hardly fail to fall into a habit of comparing notes, possibly at first in informal conversation and afterwards in more regular ways, with respect to the petitions with which they were charged; and sooner or later they would be impressed by the extent to which these individual petitions had a common foundation in the normal behaviour or misbehaviour of the ministers of the king, judges, sheriffs, escheators and so forth. Before long it must have occurred to the shrewder among these early parliamentarians that it would be wise to pool their petitions and their powers of pressure upon the crown. It was an elementary form of union, for which the crown itself had paved the way by demanding common grants of aids and subsidies from the commons at Westminster instead of demanding them from individual "communitates" throughout the country; . . .[2]

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[1] While we thus see a qualitative as well as a quantitative difference between the individual and common petitions, this was hardly in mind at the time. "By no sharp line can the petitions of the assembled lords and commoners be marked off from the general mass of those petitions which are to be expedited in the parliament by the king and his council. At a somewhat later date the line will be drawn; the petitions of the assembled commons, the petitions of 'the community of the land,' will be enrolled along with the king's answers to them; petitions addressed to either of the two houses will be enrolled, if they have received the assent of both houses and of the king; but the ordinary petitions presented to the king and council by those who have grievances will not be enrolled, though as of old many of them will be answered in parliament by committees of auditors."—Maitland, Introduction to *Memoranda de Parliamento*, pp. lxxiv., lxxv.

[2] Pollard, *Evolution of Parliament*, pp. 118, 119.

The "powers of pressure upon the crown" were at hand. Bargaining with the king for concessions of one kind or another in return for money had been an expedient thoroughly tried out by the barons in the course of the thirteenth century. An important early instance was the third reissue of Magna Carta. In the last article the clearest possible statement of the bargain was put in the mouth of the king.

> In return for this concession and the grant of these liberties and of the other liberties contained in our charter of liberties of the forest, archbishops, bishops, abbots, priors, earls, barons, knights, free tenants, and all of our realm have given to us a fifteenth part of all their movables.[1]

The circumstances of Henry III.'s reign and his personal character fostered this bargaining spirit and many illustrations of it could be given. It was not lost even in the masterful reign of Edward I. and came out prominently in the troubled last decade of that reign. As it became an established principle early in the fourteenth century that the king could not tax without Parliament's consent and as Parliament gained practice and grew conscious of itself from frequent meetings, there came to be a more routine use of the old thirteenth-century bargain. Parliament found itself possessed of a valuable commodity in exchange for which it might expect something of equal value from the king; it had money or the power to grant money and the king had the right to grant petitions. Upon this cornerstone most of the powers of Parliament have been built. The grant of money was postponed until after redress of grievances. This device was used by Parliament as early as 1309, and it soon became customary to postpone money grants until the end of the session.[2] It seems to have been early the intention and understanding on the part of the Commons that when a common petition had been assented to by the Lords and granted by the king the resulting regulation should have the force and permanence of a "statute," as that term was coming to be used under the three Edwards.[1] This was specifically demanded in 1327. "The common petition is thus the root of the house of commons as a separate legislative assembly."[2]

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[1] Stubbs, *Select Charters*, p. 350.

[2] Taswell-Langmead, *English Constitutional History*, pp. 248–250. The Commons allowed a tax "upon this condition that the king should take advice and grant redress upon certain Articles, in which their grievances were set forth." The list of grievances is an interesting one. In A. and S., document 66, is a grant of *tenths and fifteenths* for a limited

The king, however, possessed several methods of rendering these granted petitions ineffective, and he used them with skill and persistence, some of them lasting long after the infant stage in parliamentary legislation. The king had the right to legislate outside of Parliament, ordinarily taking such action through his Council. It was the old form of legislation, not clearly defined, the expression of the king's early plenary power to declare law or administer it; it was the letter patent, or the ordinance—to

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time and on conditions (1344), and document 68 is an excellent example of a grant on conditions (1348). A much later instance is in document 114 (1413). See also Gneist, *History of the English Constitution*, p. 367, note. In the reign of Richard II., the postponement of money grants to the end of the session was one of the matters dealt with in the famous replies of his judges to the list of questions put to them by the king. The time of his tyranny proved but a temporary setback to the attempts of the Commons in this line.

[1] See above, p. 239 and notes 2 and 3. Could statutes be made on petition of the clergy as well as of the Commons? It seems at first to have been the understanding that they could. There were two great divisions of human affairs, spiritual and temporal; king and Lords could enact in the former on request of the clergy and in the latter on request of the Commons. But in 1377 the Commons demanded that no statute or ordinance be made on request of the clergy without their consent. The point was really settled, indeed had been, by the withdrawal of the clergy, as clergy, from Parliament. Yet the continuance of clerical summons (see above, p. 379) made it impossible for the clergy to claim that laws were being declared about them in an assembly from which they were excluded. The petitioning part of Parliament was the Commons. All through the fourteenth century and occasionally in the fifteenth, the language of the granted petition made this clear: "by advice and assent of the Lords at the special request of the Commons." Later in the fifteenth century it was more commonly "by the advice and assent of Lords and Commons." The Lords were not thought of as petitioners; ordinarily, as far as they were concerned, the king could initiate—much of the old royal court clung to them. Yet on occasion they introduced measures.

[2] Pollard, *Evolution of Parliament*, p. 120.

give it the more appropriate name for this later period. At the close of a session of Parliament the petitions upon which action had been taken would need to be enrolled, and, until well into the fifteenth century, it was left almost wholly to the Council or to the judges to determine what petitions should receive the formality and permanence of statutory enrolment and what not. And of course either Council or judges were quickly responsive to the king's will. When therefore a granted common petition, one in which the Commons had united, received the less formal enrolment it was felt that the king had not acted in good faith. It ran counter to the dawning notion that a statute was something more solemn and permanent, and, however dimly, that another law-declaring power had collaborated with the king in making it.[1] There were, however, not many instances of such action by the king after this distinction had become clear. But king and Council still made ordinances and these were sometimes used to limit or injure a statute which the king had not been able directly to prevent.[2]

A further difficulty lay in the king's assumption of the right to annul a statute. This illustrates the difference between ordinances and statutes and worked powerfully at the time to clarify thought upon the matter. The king had been able to annul an ordinance because he had made it. He could destroy that which rested upon his sole authority. Edward III. tried to annul a statute. In 1341, a radical measure was passed, an important provision of which was that ministers and judges be appointed by Parliament; the king, under threat of no subsidy, was forced to assent to it, and it became a statute.[3] After

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[1] The development of these ideas is seen in the protests and requests of the years 1353 and 1354. See A. and S., documents 75 and 76.

[2] But for a time in the reign of the despotic Richard II. they were serious. "What is the use," asks a contemporary, "of statutes made in parliament? They have no effect. The king and his council habitually alter and efface what has previously been established in parliament, not merely by the community, but even by the nobility." Cited in Maitland, *C. H. E.*, pp. 187, 188.

[3] A. and S., document 62.

Parliament was dissolved, the king declared the statute null and sent a notice to that effect to all the sheriffs.[1] That this was regarded as an unwarranted action is shown by the facts that the next Parliament regularly repealed the statute and that this is the only known instance in which the king went to such an extreme. When the king, by countenancing Parliament's repeal, acknowledged that he could not annul a statute, he acknowledged that there was now in England a second source of legislative authority. It was no longer a matter of a specially solemn kind of ordinance with a large backing, with the king still in theory the one source of law; but a statute, to make which another source of law appeared alongside. The old theory had been broken, and the people, through their elected representatives, made written law. More and more king, Lords, and Commons were coming into coordinate relation, any one of the three by refusing to coöperate exercising a veto power.[2] Ordinances grew less in number and importance; they were looked on more as temporary or emergency measures. There has been a field for them in the intervals between Parliaments or upon occasions when immediate action was necessary. They were known later as Orders-in-Council. Even in this scope, they did not remain a means of infringing statutes; for Parliament finally got such control over king and Council as to control their legislation.

But there were other less radical means of attacking statutes. An important and long-continued one was the king's use of the *dispensing* and *suspending* powers. These grew out of the same root as his power to make or annul an ordinance. The maker of a regulation could dispense with its operation in individual cases or suspend it for a time in certain classes of cases. Some exercise of a dispensing power is necessary for any executive; for no rules of law, however good, can be enforced with absolute rigidity without at times working injustice. The right to pardon those convicted of crime is the commonest form of such power. But there is evidence that the fourteenth-century kings so used the dispensing and suspending powers as to make Parliament fear for its statutes. How consciously they did this to fight Parliament it is hard to tell. The dispensing power, which was then the more common, was in the eyes of Parliament, as truly an invasion of their domain as the making of a new writ in Chancery or the extension of the jurisdiction of the Council.[1] It was often used in the reign of Edward III. practically to license crime, pardons being given before the accused were brought to trial; and the character of the crimes, of which the king seems often to have known little, discredited it still further. Attempts were made by the Commons in 1328,[2] 1330,[3] 1347, and 1351 to do away with the abuse, but, despite promises by the king, it continued. Under Richard II., a statute was passed forbidding the issue of pardons in the case of serious crimes, unless they specified the nature of the crime and contained the name of the culprit. This principle, although often violated, has remained in the law of pardons. At the end of the century, nothing had been done to regulate the dispensing power outside the matter of pardons, and it continued a vague and dangerous factor in the royal prerogative. The suspending power was then seldom used, but in it lay even greater possibilities of despotic action.

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[1] A. and S., document 63. The language of the annulling order is interesting; it illustrates the notion that law was something which could not be changed even by a statute. This statute was annulled because it was "expressly contrary to the laws and customs of our realm of England, and to our prerogatives and rights royal." The king then goes on to represent that he granted the petition practically under duress and that "the said parliament otherwise had been, without dispatching anything, in discord dissolved." Which means, of course, no more than that Parliament was pursuing its regular policy of postponing money grants to redress of grievances. The king had consented in order to get money, and then claimed that his consent was "pretended."

[2] The last time the veto power was exercised by the sovereign was in 1707. It could not be used after the cabinet system of government came into existence. Since 1911 the Lords have had only a suspensive veto.

Since statutes usually began as petitions, it was necessary in engrossing the granted petition as a law, putting it in statutory form, to make changes in its wording. And these changes might extend to unwarranted changes in sense. This work was entrusted, as was natural, to the judges of the common-law courts. As members of the Council these judges were, until the middle of the fourteenth century at least, full-fledged members of Parliament, and thereafter its authoritative advisers in all matters relating to the law. In view of this fact and the fact that the embryonic statute came to them usually as the barest outline of principles, the judges would naturally interpret their task liberally. It

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[1] See above, pp. 213, 214 and note 2, 220, 221, 300, 301.

[2] A. and S., document 56.

[3] *Ibid.*, document 57.

meant not merely the penning of the statutes; it extended to the form, and probably, to some extent, to the subject matter itself. The brevity of the statutes when completed shows how much these judges who framed them were intentionally leaving to be interpreted by themselves or their colleagues in the light of the individual circumstances through which the statutes would be brought before them in the courts.[1]

This whole situation inhered in the fact that legislation had had its genesis in petition. Until a new method of initiating statutes had arisen Parliament could never feel sure that it had really made them.[2]

C.—In its endeavours to control taxation and in its development of the statute-making power, Parliament felt bound to assume or seek some responsibility in the administrative side of government. How inevitable this was has already been incidentally shown. It remains now to notice more directly the beginning of a line of development which has, in modern times, resulted in complete harmony between the executive and the legislature, with the latter, representing the people in substantial control.

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[1] McIlwain, *High Court of Parliament*, pp. 324, 325. "Why should a judge have any great awe of a statute, which perhaps he himself, or, at most, his predecessors in office, had helped to make; of which possibly the whole form and expression had been the work of himself, and his colleagues of the Bench?" *Ibid.*

[2] See below, p. 432.

In using these terms for departments of government, it must be remembered that men in the fourteenth century knew no such distinctions. It is easy to think that a struggle for liberty on the part of the people began at this time, the people for the first time being able to act in an effective way through a representative Parliament;[1] and in one sense such a struggle did begin. But the participants were not conscious of it as such. The king was not upholding royal prerogative against government by the people; he was simply resisting something which was taking away his power, without seeking to justify his action upon any dogmatic basis. The House of Commons was conscious of administrative abuses; its constituents were suffering from them; it sought an extension of power to remedy these abuses; but uninfluenced by a theory of government by the people. And there was no limit to the power it sought; for, being unconscious of any categories of government, it could know of no propriety in observing limits beyond which the legislature should not extend its activities. There was no legislature as such, and no self-conscious emulation among powers which were "separated." So king and Parliament began their long conflict in the naïve, short-sighted, unidealistic fashion in which nearly all medieval conflicts were fought. However, the relations between the two in the fourteenth century were far from continuously hostile; in many instances, they worked together for common ends with much good feeling. In the strict sense they were not two: "the king in his council in his parliament" was as yet the undivided highest authority in the realm.

As the first business of Parliament was to grant money, a natural extension of its activity was towards ensuring honesty and accuracy in its collection and in showing an interest in its expenditure.[2] In 1340, parliamentary commissioners were appointed to audit the accounts of the collectors of recent subsidies[1]; and in 1353 a subsidy was granted with the stipulation that it was to be used only for the war. This interest in public business, in the character and work of public officials, accounts largely for the extreme statute of 1341[2]; the auditing commissions were renewed, the appointments of important public officials and judges were to be sanctioned by Parliament, and in that body these men were to swear to the observance "of the Great Charter, and the Charter of the Forest, and all other statutes, without breaking any point."[3] This act went too far, and in the following Parliament the king secured its repeal. When, in modern times, control of the ministry was finally secured, it was by a different method, but the statute of 1341 is undoubtedly prophetic. However, there was one permanent achievement in this line dating from the fourteenth century: parliamentary *impeachment*, the first instance of which was in 1376.[4] The historical and legal basis of impeachment lay in Parliament regarded as a high court and in the Commons as the grand inquest or jury of the nation. It was the trial before the Lords of persons, generally officials, impeached or indicted (the two words originally meant the same) by the Commons for a public offence; the Lords judged, the Commons prosecuted. This bringing to trial the king's most powerful ministers, in a manner likely to secure justice as it could not be secured in the royally dominated or locally intimidated courts, and for offences which, though serious, might not be technically admissible there, was the one clear-cut technical method of controlling the crown which the middle ages bequeathed to modern times.

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[1] Only a few people were represented in the Commons if we think of representation as conditioned at all upon election.

[2] See the closing words of article 1 in the famous statute of 1340, A. and S., p. 105; also document 61.

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[1] A. and S., document 61. For later examples of parliamentary supervision of accounts, see *ibid.*, documents 83–86. For other instances of parliamentary interference of this general sort, see Maitland, *C. H. E.*, p. 184.

[2] See above, p. 419.

[3] A. and S., p. 108.

[4] *Ibid.*, document 82. See also the interesting impeachment of Suffolk in 1386. *Ibid.*, document 93. Treason was first defined by statute in 1352. (*Ibid.*, document 72.) This may have suggested indicting men for treasonable offences in Parliament. On the origin of impeachment, see Medley, *English Constitutional History*, pp. 175, 176.

Two more general ways in which Parliament touched administration remain to be mentioned. Throughout the fourteenth century, the Commons were diligent in pointing out abuses, especially in judicial administration, the burden of the complaint being that the king's judges and other officials, notably the sheriffs, did not vigorously and impartially enforce the laws.[1] To get such information was one of the original objects with the king in summoning representatives, and he made much use of it. He took the Commons into his confidence and quite regularly asked their advice upon judicial matters and upon the best methods of holding his officials in check. The second matter had to do with Parliament's participation in foreign affairs. In the reign of Edward III., the war with France was the greatest subject of popular interest, while the troubles with Scotland were of no small importance. Voting money to maintain these undertakings almost necessarily made Parliament a counsellor at the crisis, when it came to questions of concluding peace or continuing the war. In 1319,

> straightway after Easter a parliament was held at York where it was unanimously agreed that our Lord the King and all his barons should journey towards Scotland in the next month after the feast of St. John the Baptist.

In 1333,

> the King by the Chancellor asketh whether it were best to treat with the French by way of amity or marriage according to the offer of the French. The Commons think the way of marriage the best.

In 1369,

> the king held a parliament at Westminster, where was considered what is best to do about the rebellion of France, not-

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[1] Taswell-Langmead, *English Constitutional History*, pp. 248–250; A. and S., pp. 94, 95, and documents 56 and 57.

withstanding her writing and her oaths. There it was concluded the king should challenge his right again.[1]

Parliament was thus consulted many times and often expressed its mind freely, but in the latter part of the reign it was less inclined to give positive advice. It probably felt that too avowed a partnership with the king might be embarrassing when it came to financial dealings with him.[2]

8. **Parliament in the Fifteenth Century.**—There was a slowing up of institutional growth after the fourteenth century. The growth by no means stopped, but, contrasted with the three preceding centuries, the fifteenth was a time of practice and precedent, of adjustments, the working out of details. There was in it also a hint of modern political self-consciousness. Men began to ask questions about, and look appreciatively upon, institutions which had been made without awareness and accepted without comparison or curiosity. Some of the fifteenth-century history of Parliament has of necessity been covered in the foregoing topics; the purpose here is supplementary, to deal with matters which specially characterise the period or which could not be conveniently brought in earlier.

Two acts of the fourteenth century have been noted which provided that Parliaments be held annually or more frequently if necessary.[3] The king had been in the habit of assembling his feudal court for short sessions at least three times a year: the judicial side of its work was probably the chief cause of this regularity and frequency. It was with this court, now called Parliament, that knights and burgesses were being assembled for part of the session at least early in the fourteenth century. But its rapidly decreasing work as a court of law made it unnecessary to meet so often, and annual Parliaments came nearer to being the rule in the long reign of Edward III. The sessions remained short; the knights and burgesses especially felt it a burden to be called from home, where they had important concerns which these trips to Westminster badly disturbed. But as the political importance of Parliament grew and it was found that things could be done there of use to the representatives and their constituents as well as to the king, richer men were returned from both county and borough, and they were not in such a hurry to get home. Also the scheme of voting taxes for more than one year began to be used in the reign of Edward III.; and before the end of the fourteenth century, it was found that a Parliament might on occasion be prorogued instead of dissolved, thus making it unnecessary to have a new election for every new session. For these reasons, annually elected Parliaments ceased. Sovereigns never seem to have felt obliged to adhere strictly to the statutes requiring them, and in the fifteenth century these fourteenth-century statutes, though still unrepealed, were unheeded. The frequency of new Parliaments and the frequency and length of sessions came to be determined almost wholly by the circumstances and needs of the time. The power of the king to summon, prorogue, or dissolve Parliament at pleasure was unquestioned. Henry V., Henry VI., and Edward IV. were less dependent upon Parliament for money than were the earlier kings. Tunnage and poundage gave them a more regular revenue, and forced loans and later, benevolences, helped. In Edward IV.'s reign of twenty-two years there were but six Parliaments, and there was a period of five years in his reign during which Parliament did not meet. Yet there is no evidence that he or any other pre-Tudor king was attempting to fight Parliament or build up a tyrannical power by doing without Parliament.

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[1] For these references (*Chronicles of Edward I. and Edward II.*, ii., 56; Cotton's *Abridgment*, p. 9; Capgrave, *Chronicle of England*, p. 226), I am indebted to Professor Notestein.

[2] For Parliament's efforts and accomplishments in controlling the Council early in Richard II.'s reign, see above, pp. 299–301.

[3] See above, pp. 399, 400.

The origin of the Speaker of the Commons is very obscure. The Commons did not have the privilege as individuals to address the Crown, to present petitions, to make formal replies to questions addressed to them. These things must be done through some one of their number appointed for the purpose. Their discussions were carried on, not in the Parliament house, but in Westminster Abbey, and when a decision was reached they returned across the street, and one chosen to speak for them made the formal reply in their hearing in Parliament. Such was the origin of the Speaker, of whose existence we get but a scanty trace in Edward III.'s reign, but whom we must suppose regularly functioning in that reign, or perhaps earlier. Whether the Commons chose him or had any voice in his choice we do not know. In the reign of Richard II. the Speaker appears as a well recognised official, but did not in any true sense represent the body for which he spoke, being usually controlled by one or other of the factions in the nobility. Under the Lancastrians he more distinctly belonged to the Commons. They named him, but the nomination was subject to the Crown's assent. There was little *esprit de corps* among the Commons and so little mutual acquaintance in the case of a newly elected House that a sovereign who so desired could practically name the Speaker. This was regularly the case during most of the Tudor period. The political importance of the Speaker might be great, for he was the official medium of communication between the Commons and the king; a servile Speaker could render the work of the House abortive in many ways. Of the procedure of the Commons in the middle ages, of their sessions and debates when they sat by themselves across the street and wrought out the answers or requests which the Speaker delivered at their head in Parliament, or how or when he became their presiding officer, there is nothing known. The earliest surviving records of the proceedings of the House of Commons are for 1547. In the fifteenth century the Speaker was almost always one of the shire representatives, but with the rise in importance of the borough members at the end of the century this ceased to be the rule.

There were some important fifteenth-century changes in Parliament's exercise of power and in the relations of Lords and Commons. The interruption to the practice of postponing money grants to redress of grievances in the despotic last years of Richard II.'s reign, was a matter of concern under his Lancastrian successor. In 1401, the Commons prayed the king that they might know his answers to their petitions before any money grants were made. Henry refused this on the partially unhistorical ground that it had not been the practice of his predecessors.[1] But he could not hold this position. Under all ordinary circumstances, the Commons could hold out longer without granted petitions than the king could without money. Kings in England had built up no standing army, no professional military force under their control; they could not take their subjects' property by the strong hand, and the Commons' consent was a necessity. There was quite a steady growth in the practice of postponing money grants throughout the fifteenth century, and grants with more or less specific conditions attached were the rule.

There arose, however, in 1407 a problem which involved the relation of Lords and Commons in the matter of money bills. It was readily disposed of in favour of the Commons, but it was important. The king and Lords had had a conference about a grant of money to be made by the Parliament then in session and concluded upon a *tenth and fifteenth* and a half. This was clearly regarded as settling the matter, but of course the Commons would have to assent. Accordingly they were asked to send a deputation to the conference, and the twelve men sent were told what the king and Lords had determined and were then bidden report it to their associates, with the implication that speedy acquiescence was expected.

Which report having been made to the said commons, they were greatly disturbed, saying and affirming that this was in great prejudice and derogation of their liberties; and when our said lord the king heard of this, not wishing that anything should be done at present or in time to come, which could in any way turn against the liberty of the estate, for which they were come to parliament, nor against the liberty of the lords aforesaid, willed and granted and declared, with the advice and assent of the said lords, in the following manner. That is to say, that it is lawful for the lords to discuss among themselves assembled in this present parliament, and in every other in time to come, in the absence of the king, concerning the estate of the realm and the remedy needful to it. And that in like manner it is lawful for the commons, on their part, to discuss together concerning the state and remedy aforesaid. Provided always that the lords on their part and the commons on theirs, make no report to our said lord the king of any grant granted by the commons, and agreed to by the lords, nor of the negotiations of the said grant, before the said lords and commons shall be of one assent and of one accord in the matter, and then in the manner and form customary, that is to say by the mouth of the speaker of the said commons for the time being, to the end that the said lords and commons should have the agreement of our said lord the king.[1]

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[1] A. and S., document 109.

The words "granted by the commons and agreed to by the lords" renewed the formula of 1395 and certainly show that it was the intention to have the initiative in money grants lie with the Commons; and it became, in the fifteenth century, a recognised principle that all money bills must originate in the lower House. To be sure, the Commons had the right not to concur in a grant originating with the Lords or, as in this case, with the king and Lords, but they foresaw the amount of pressure which might be brought to bear in favour of a money bill once formulated and that the right to formulate it was no empty one.[2]

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[1] This is part of the so-called "schedule of indemnity" which the king ordered entered on the roll of Parliament. A. and S., document 112.

[2] This was the beginning of a long and important line of development. By the late seventeenth century this right was interpreted as meaning that the Lords could not amend a money bill: they must accept all or reject all. By the nineteenth century the Lords had practically lost the right

The right of each House to carry on its preliminary discussions independently of the other and both independently of the king, and that the king was to have no concern in a bill until the Houses had become a unit—axiomatic principles of parliamentary government—were being worked out under favouring Lancastrian conditions. They were broken often under Tudors and Stuarts, but there were fifteenth-century precedents for later parliamentary historians to cite.

In leaving the subject of money bills, it should be added that, before the end of the middle ages, the king had hit upon two famous ways of dodging the principle, set forth in 1340, that there could be no taxation without the consent of Parliament. *Forced loans* began with Richard II.; they were, as the name implies, negotiated without the option of the lender, and their payment was always improbable. In the reign of Edward IV., the *benevolence* was invented. This was theoretically a free, but actually a forced, gift taken by the king from the wealthier people of the realm. Benevolences were often winked at by the Commons, who felt that if the king got his money in this way he would be less likely to burden the poorer classes with regular taxation.

> The difference between a forced loan and a benevolence or free gift is not easy to grasp; for a loan taken at the king's pleasure might also be repaid in his own good time, and with a complaisant Parliament to back him the distinction entirely disappeared.[1]

These devices were used to great effect by Tudors and Stuarts and were supplemented by that last and most famous dodge of constitutional taxation, the Stuart

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to reject. For an excellent short account of this evolution, see Taswell-Langmead, *English Constitutional History*, pp. 549–551. This complete control of money bills by the Commons is the key to much of the great episode of the Lloyd-George Budget and the Parliament Act, 1909–1911. See W. and N., Problem VIII.

[1] Medley, *English Constitutional History*, pp. 577, 578.

"ship-money." They were not used after the Great Rebellion.[1]

It has been seen that a vexatious means of defeating Parliament's legislation was the alteration of the wording of granted petitions by the judges who engrossed them as statutes.[2] At the beginning of Henry V.'s reign, this was made a matter of formal protest by the Commons. The king replied that nothing should be "enacted contrary to their asking whereby they should be bound without their assent."[3] But despite this promise, there was still danger that the thing might be attempted upon occasion. A great advance towards remedying this evil began apparently about the middle of the century; it was to do away with the petitionary language and introduce *bills*, which were, in form and language, completed statutes and became such by the united assent of Commons, Lords, and king.[4] It was a slow change, but was completed before the end of the first Tudor reign.

Later on the House of Lords also began to originate Bills, which were sent thence to the Commons; and it gradually became the established rule of Parliament, that with the exception of Money Bills, which must come from the Commons, and of Bills affecting the Peerage (*e.g.*, for the restitution of forfeited honours), which must come from the Lords, all other Bills might be originated in either House.[5]

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[1] In the reign of Richard III., a statute was passed abolishing benevolences (A. and S., document 133). This was afterwards disregarded on the ground that Richard was a usurper, which made laws passed during his time invalid.

[2] See above, pp. 421, 422.

[3] A. and S., document 117.

[4] Although, after the use of bills the judges had no opportunity to make changes, the sovereign might introduce modifications before the royal assent was given. Elizabeth seems to have been the last sovereign to do this. In the fifteenth century the form of the sovereign's assent to a bill was, what it still is: *Le roy le veut.* The veto was in the polite words: *Le roy s'avisera.*

[5] Taswell-Langmead, *English Constitutional History*, p. 293. In recent years the House of Lords has almost wholly ceased to initiate legislation. Ministries, no matter to what party they belong, introduce their measures in the House of Commons.

The courts attempted during the fifteenth century to supplement fourteenth-century legislation on the dispensing power.[1] Subtle distinctions were drawn between the cases in which the king could and could not exercise the pardoning power. It was found difficult to apply these in the practice of the courts, and perhaps their only result was the evolution of the principle that the pardoning power could not be so used by the king in behalf of an offender as to deprive a third party of a claim growing out of the offence. As to the suspending power, attempts were made to limit it, but little progress was made. Both of these powers were abused by later sovereigns, especially the Stuarts. By the Bill of Rights, the suspending power was abolished, while the dispensing power was placed under effective parliamentary control.[2]

The advances which Parliament made in the Lancastrian period in its control over taxation and legislation were small in comparison with the easy and sweeping successes which it seemed to gain over the administration. The hard-fought beginnings in this line which belong to the fourteenth century, when masterful kings resisted and, in some lines, Parliament drew back from the assumption of too great responsibility, gave place to such sudden and thorough-going control over king and ministers that one begins to question its genuineness. Especially does one wonder at the sudden boldness and initiative of the Commons, and the suggestion has been made that the Commons, as the petition-making body, was sometimes the channel through which petitions passed that had had their inspiration with the Lords. Such things might easily be done when the purposes of the two did not diverge too far, and in some of these Commons' demands upon Lancastrian kings there may be an echo, or more than an echo, of the old baronial jealousy of the royal power.[1] Henry IV. was a parliamentary sovereign in a sense in which none of his predecessors had been; to secure his family upon the throne he felt obliged to be on good terms with his people. The first and most conspicuous attempt of Parliament in the administrative line was to control the appointment of ministers and hold them strictly responsible for their acts. This was the resumption of a policy that was very marked in the early part of Richard II.'s reign.[2] Formally, Parliament seldom, if ever, attempted to come quite so near the actual appointment as had been rashly proposed back in 1341;[3] but during most of the Lancastrian period, the king's appointees were practically nominated by Parliament.

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[1] See above, p. 421.

[2] A. and S., pp. 464, 469. For further information on the dispensing and suspending powers, especially in modern times, see Anson, *Law and Custom of the Constitution*, i., 297–305; ii., 228–230.

In 1406, the Commons gained the king's assent to a lengthy petition of thirty-one articles that, at first sight, seems a great achievement in constitutional government. In the first article, the king was required to

> elect and name sixteen counsellors and officers pleasing to God and agreeable to his people, on whom he could rely, to advise him and be of his Continual Council until the next Parliament, and a reasonable number of whom should be continually about his person.

One cannot read of this limited group of counsellors and officers, some of them to be specially near the king, and of the implied dependence upon Parliament without the thought that here was a suggestion of the Cabinet. It indicated the direction which governmental development would take when, after long and hard experience, the people through Parliament came to their final and maturer control of the executive. In the articles following, there was much about the limitations, functions, and responsibility of the members of the Council and the officials, even providing for their being sworn in Parliament to observe the common law and the statutes, and much about economy in administration and the king's household.[1] For a time in the reign of Henry IV., king, Council, and Parliament worked together in an astonishing, if somewhat artificial, harmony.

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[1] This suggestion has come to me in a paper by Professor J. E. Neale on *The Commons' Privilege of Free Speech in Parliament*, the manuscript of which has been placed in my hands through the kindness of Professor Notestein.

[2] See above, p. 300.

[3] *Ibid.*, pp. 419, 424.

Notwithstanding this activity in holding ministers responsible, it so happened that, after the reign of Richard II., Parliament found few occasions to exercise its power of impeachment until the notable case of the Duke of Suffolk in 1449. But during the rapidly changing Parliaments in the period of civil war and bitter personal animosities immediately following, the judicial procedure of impeachment was found too slow in dealing with political enemies. Bills of attainder (also called *acts of pains and penalties*) came into use, and until 1621 there was not another impeachment. These bills were a variety of the private bills growing out of the individual petitions which Parliament entertained, and like all such were partly legislative and partly judicial in character. They contained the accusation and provided for the punishment of the persons against whom they were instituted, and were introduced and passed like other bills.[2] Thus there was no need, as in impeachment, to bring in evidence or go through the forms of court procedure. The man charged in the bill was condemned unheard. The courts, as was natural, came to look askance at these acts, but dared not directly impugn the doings of the High Court of Parliament. Sometimes bills of attainder were useful in dealing with powerful misdoers, the nature of whose offences made it hard to furnish evidence at all satisfactory to a tribunal which regarded itself as strictly a court of law. But punishing men by legislation has, for the most part, been an abuse, whether as in the Yorkist period, a means of wreaking factional vengeance, or when the Tudor sovereigns used their obedient Parliaments to rid themselves of their personal opponents.

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[1] For the provision quoted and a summary of the articles, see Taswell-Langmead, *English Constitutional History*, pp. 296–298.

[2] On the origin of Bills of Attainder, see Stubbs, *Constitutional History*, § 371; Pike, *Constitutional History of the House of Lords*, p. 229; Anson, *Law and Custom of the Constitution*, i., 337; Medley, *English Constitutional History*, pp. 176, 177.

Further administrative gains of Parliament in the Lancastrian period were its victory in the matter of auditing public expenditures, a function claimed under Edward III., and its greatly extended counsels in matters of national policy.[1] In 1406, the public accounts were asked and, the king being ill at the time, it was answered in his name that "kings were not wont to render accounts." This, however, seems to have been but a feeble remonstrance, for Parliament continued to press for them, and in 1407 the accounts were voluntarily produced by the king. From that time, this right of Parliament was never directly denied. In counselling the king, Parliament no longer showed fear of assuming responsibility, as in the preceding century. So fully did it feel in control of the granting and expenditure of money that all critical questions arising in the conduct of the war with France were considered by it, and there were few matters of national importance in which the king did not take into his confidence the representatives of the nation. In concluding this summary of Parliament's fifteenth-century means of controlling the king, it should be stated that in the right to audit public accounts and in impeachment and bills of attainder Parliament had something more permanent and practical than resulted from its schemes to gain complete control by dictating the ministry.

An evidence that Parliament was maturing was the emergence of what came to be known as its *privileges*. Customs grow in an aging institution, taking the form often of immunities or rights. In an institution of growing importance, one which has to guard against attack or loss of power, some of these begin to stand out as specially valuable and become definable and technical.[2]

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[1] See above, pp. 423–425.

[2] "In the wide and loose application of the word 'privilege' the privileges or peculiar functions and usages of the house of lords are distinguished

In the sixteenth century it became the custom at the opening of Parliament for the Speaker of the House of Commons to make formal request of the sovereign to recognise the customary privileges of the House. This was done regularly in the reign of Elizabeth; isolated instances are found earlier, but whether they indicate a custom we have not the means of knowing. Many privileges were sought by the Commons before the end of Elizabeth's reign, but three, whose origin goes back to early times, have been regarded as fundamental. The three are these: freedom of access to the sovereign through their Speaker; freedom from arrest or molestation during the time of Parliament; freedom of speech.[1] Something can be said of their medieval beginnings, but much is left in the dark, especially relating to freedom of speech, because no records survive earlier than 1547, of what the Commons did in their separate meetings in the Chapter House. The Parliament Rolls tell only of their answers and decisions reported in Parliament by their Speaker.

Freedom of access was almost always recognised by the sovereign. Each peer had the right on the ground that he was an hereditary counsellor of the crown. This did not mean, of course, that he was a member of the Council; the right went back to the parent stem of both Council and House of Lords, the king's feudal court, in which the vassals were in personal relation with their suzerain. The

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from those of the house of commons; the privileges of individual members of the house of lords may be distinguished from the privileges of individual members of the house of commons; both again have common privileges as members of the parliament; and the lords have special privileges as peers, distinct from those which they have as members of a house co-ordinate with the house of commons." Stubbs, *Constitutional History of England*, § 448. It is with the "common privileges as members of the parliament" that we are concerned here, and it was in this connection that the term took on its technical meaning. Yet, as will be seen, the political significance of the privileges lay almost wholly in connection with the House of Commons and there was where the struggle for them took place. They are not to be confused with the functions or powers of Parliament considered in Part III., § III., 7. For a detailed enumeration under the categories named in the passage cited, see Stubbs, *op. cit.*, §§ 448–453.

[1] For the first record of the exact words in which the request was made see Prothero, *Statutes and Constitutional Documents*, p. 117.

Speaker of the House of Commons was the result of a growing demand for a regular intermediary between that body and the king. Through him the king spoke to the Commons and the Commons to the king. Also he became—and the importance of this grew with the growth of legislation—the spokesman between Commons and Lords. Very early in the history of the Speaker we find him guarding himself against captious treatment on account of anything he might say through ignorance or carelessness. In 1401, Sir Arnold Savage asked that

> if he should say anything through ignorance, negligence, or in any other way which was not agreed to by his companions or which should be displeasing to the king, or too little through lack of wisdom, or too much through folly or ignorance that the king would excuse him therefor, and that it might be corrected and amended by his said companions.[1]

This was long felt to be a point to be guarded in connection with freedom of access: in 1562 the Speaker had substantially the same point in view when he asked

> that in repairing from the Nether House to your Majesty or the Lords of the Upper House, to declare their (the Commons') meanings, and I mistaking or uttering the same contrary to their meaning, that then my fault or imbecility in declaring thereof be not prejudicial to the House, but that I may again repair to them, the better to understand their meanings and so they to reform the same.[2]

It was freedom of speech through the Speaker, and is of course to be distinguished from that of individual Commons in the private discussions of their House. To have at all times the right to petition, counsel, or remonstrate with their sovereign through their chosen representative and have a favorable construction placed on his words was justly regarded by the Commons as a fundamental privilege.

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[1] A. and S., document 107. Such requests or protestations go back at least as far as 1377.

[2] Prothero, *Statutes and Constitutional Documents*, p. 117.

In connection with most early assemblies that were in any way identified with the king, is to be found some idea of a royally sanctioned safe-conduct; the king's peace was to abide in his assembly and was to extend to the members in coming to it and returning from it. Naturally, these royal sanctions applied to Parliament. But as time went on, molestation of members was more likely to be through some process of law than through direct bodily injury or restraint.[1] Unless Parliament could keep its membership intact, free from outside interference, whether or not the interference was with the motive of embarrassing its action, it could not be confident of any accomplishment. Early in Henry IV.'s reign, a request was made that threefold damages be exacted of any one assaulting members on their way to Parliament. This request was not granted, but what the king considered a substantial protection was being enforced at that time. In 1430, Parliament asked that the general principle be laid down

> that no one of your said lieges, that is to say, lords, knights from your counties, citizens, burgesses, in your parliaments to come, their servants or familiars, be at all arrested nor detained in prison during the time of your parliament, except for treason, felony, or surety of the peace as was said before.[2]

But this the king was not ready to grant. However, he allowed at the same time a specific instance of such immunity in the case of a member's servant who had been arrested in an action of trespass. In 1332, a statute was passed allowing double damages in case of assault upon a member on the way to Parliament. In 1453, came the famous case of Speaker Thorpe, the only exception to the privilege of freedom from arrest in the fifteenth century and manifestly the result of the bitter partisanship of the time.[1] There were many cases in the last half of the century which confirmed the privilege, one of the most prominent being that of Walter Clerk, who represented the borough of Chippenham in 1460.[2] By the end of Edward IV.'s reign, the privilege had become established, as also a method of procedure in case of its breach.

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[1] But there may be a "modern importance of this point as a point of privilege, rather in the threat of violence than in the actual infliction."—Stubbs, *Constitutional History*, § 452.

[2] A. and S., document 122.

The privilege was in no case extended to imprisonment for treason, felony, or for security of the peace: it was loosely allowed to the servants in attendance on members, and it was claimed for a time preceding and following as well as during the session. The length of this period was variously stated, and has not been legally decided. The general belief or tradition has established the rule of forty days before and after each session.[3]

The third privilege, freedom of speech, was by far the most important, though there could be no surety of its exercise until freedom from arrest had been established. When a king conceded freedom of speech, he was, consciously or unconsciously, conceding that Parliament was a higher power than he; conversely, there could be no assured government by the people, or any part of the people, unless their representatives had unquestioned possession of this privilege. Thus only the House of Commons was concerned in its vindication, and only in its connection with that House could it be a matter of constitutional importance.[4] In the early Parliaments there could be no issue on this point. Knights and burgesses were there to do the king's bidding. What little private discussion they had on money or other matters which he laid before them would not be likely to take a form of any importance to him. They said what they chose, and no one cared. But in the last quarter of the fourteenth century and early part of the fifteenth conditions were different. It was a time when the country was sharply divided into factions—the long pause in the Hundred Years War brought turbulent elements back to English shores; many people were tiring of the heavy taxation, now that there seemed no very good reason for it; in 1377 that eccentric youth Richard II. came to the throne; and on almost any basis of reckoning Parliament was in the neighbourhood of a hundred years old, the Commons now something more than a gathering of discrete juries to answer the king's questions. Under these circumstances there could hardly fail to be things said and done in Parliament that would rouse the king's ire and bring on bickerings and discussions which might easily harden into notions of privilege. There was a feeling after something, an evidence of a slowly rising clash of interests that different types of occasion brought to the surface. The first hazy tentatives in the direction of a free speech issue took shape along the following lines: First, whether or not the Commons should keep to the royal *agenda*, the program laid before them in the king's name at the beginning of the session. Richard II. asked his judges whether Parliament had the right to postpone his points (largely relating to supply) and talk about others. Second, the Commons wanted the king to accept information of their doings and sayings only through responsible and approved channels. Leakages and tattlings would be sure to distort and would put them all in fear. Third, the direct issue, could men be punished for their words in the Commons, words that fell short of anything treasonable?[1]

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[1] Thorpe was a Lancastrian and an enemy of the Duke of York; he was arrested at the latter's instigation for non-payment of a fine imposed for a trespass. The Lords consulted the judges, who somewhat grudgingly admitted that the privilege should be allowed, but carefully disclaimed any right to determine the matter, which, they said, lay wholly with the Lords. The Lords, under Yorkist influence, decreed that Thorpe should remain in prison.

[2] The record of this case especially well illustrates how the matter was regarded and dealt with at this time. See A. and S., document 127.

[3] Stubbs, *Constitutional History*, § 452.

[4] The Lords, of course, possess the right equally with the Commons, and thus it is considered one of the common privileges of Parliament. But it seems never to have been an issue with the Lords. As Stubbs says, "he would have been a bold king indeed who had attempted to stop discussion in the house of lords."—*Ibid.*, § 451.

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[1] For a detailed account of the beginnings of the privilege of freedom of speech in Parliament, see Professor Notestein's paper in W. and N., pp. 161–176.

In 1397, a bill was introduced in the House of Commons containing one clause which particularly angered the king. It attacked the extravagance of the court, asserting that many bishops, lords, and ladies were living there at the king's expense. Richard felt that this was in special derogation of his prerogative and demanded the name of the man responsible for this clause. Acting for the Commons, the Speaker gave the name of Thomas Haxey. It has been assumed that Haxey was a clerical proctor, attending even at that late date under the *præmunientes* clause.[1] But there is no absolute proof that he was a member of Parliament. His bringing in a bill does not prove it. However that may be, the king and Lords immediately enacted an ordinance making it treason to move in Parliament anything touching the king's royalty, and under this *ex post facto* law Haxey was, two days after, condemned to death. Perhaps the king had no real intention to execute him; at any rate, the archbishop claimed benefit of clergy for him and the claim was allowed by the king. Three months later, he was released. But the first Parliament of Henry IV., assembled in the Fall of 1399, was not satisfied to let the matter rest in this condition. They claimed that "the said Thomas was adjudged a traitor, and forfeited all that he had, contrary to the right and custom which had been used before in Parliament, in destruction of the customs of the commons." And they asked the king

> to amend that judgment and make it void as erroneous; and to reinstate the said Thomas fully in his rank, estate, goods, etc. . . . as well in fulfillment of the right as for the saving of the liberties of the said commons.[2]

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[1] See above, pp. 373, 379. The Commons assumed at this time a humble attitude and raised no claim of privilege. Possibly, as a clerical proctor, they did not regard Haxey as a member of their House and possibly he was not; but there is no doubt that they were intimidated by king and Lords, for they acknowledged an impropriety in entertaining the bill.

[2] A. and S., document 105.

A reversal of the former judgment appears upon the roll of Parliament. While we cannot be sure that the Haxey case was a vindication of a member's right to free speech in the Commons, yet the language used proves that the Commons felt that their customs and liberties had been invaded, and the offence lay in the introduction of a bill obnoxious to the sovereign, as so often in the reign of Elizabeth.

The second Parliament of Henry IV., assembling in January, 1401, was well placed to follow up this beginning. The needs of the king were great, as shown by the opening speech of the Chief Justice. This gave the Commons a hold upon Henry which they were quick to see; they were a little nettled at the tone of the speech, which bade them give more than usual attention to the affairs of the nation and cautioned no one to go home until the business was over; and they were fortunate in the temper of their Speaker, Sir Arnold Savage. His first address to the king suggests those regular requests for privilege with which the Parliaments of Elizabeth were opened. He asked "that the said commons should have their liberty in parliament as they had had before this time and that this protestation should be recorded in the roll of parliament." This "seemed honest and reasonable to the king and he agreed to it." The Speaker further prayed that the Commons might have "good advice and deliberation" on the matters brought before them "without being suddenly called upon to reply to the most important matters at the end of parliament, as had been done before this time." The king replied that it was his intention "to follow this order of action and that he did not imagine any such subtlety, also that they should have good advice and deliberation from time to time as the need demanded."[1] Three days later, a further point was pressed. The Speaker, in another address to the king, stated on behalf of the Commons how on certain matters moved among them, it might happen in the future that certain of their companions, out of complaisance to the king, and for their own advancement, should recount to our said lord the king such matters before they had been determined and discussed or agreed upon among the commons, by reason of which the said lord our king might be grievously moved against the said commons or some of them.

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[1] A. and S., document 107.

The reply of the king was

that it was his will that the said commons should have deliberation and advice, to discuss and treat of all matters among themselves, in order to bring them to a better end and conclusion, in so far as they know how, for the welfare and honour of himself and of all his realm. And that he would not hear any such person or give him credence, before such matters had been shown to the king, by the advice and with the assent of all the commons, according to the purport of their said prayer.[1]

Thus was the right of free and ample deliberation guaranteed to the Commons at the beginning of the Lancastrian period. In 1407, substantially the same promise was repeated.[2] Then little is heard of the right until the arrest of Speaker Thorpe in 1453.[3] Two privileges were invaded in this case: Thorpe was arrested while he was a member of Parliament and manifestly because of things he had done and said in Parliament. It has already been seen how unsatisfactorily the case resulted for the Commons, who practically acknowledged their defeat by allowing him to remain in prison and choosing another Speaker. Thomas Young, a burgess for Bristol, was imprisoned and suffered considerable loss of property for something which he said in the Parliament of 1451. Four years later, he presented a petition to the Commons, in which he told them that they

[1] A. and S., document 108.

[2] *Ibid.*, pp. 176, 177.

[3] See above, pp. 439, 440, note 1.

ought to have their freedom to speak and say in the house of their assembly as to them is thought convenient or reasonable without any manner challenge, charge, or punition therefore to be laid to them in anywise.[1]

Compensation was procured him at the king's order. But

matter of privilege as it was, the prayer is for personal and private indemnity: the commons seem to have no remedy but petition, and no atonement is offered to their injured dignity. So the case stands in the last years of the Lancastrian rule.[2]

Nothing can be added for the Yorkist period.

Clearly the conception of a Parliamentary right of free speech had made progress in the reigns of Richard II. and Henry IV. And yet the sum total of evidence is disappointing. It would be hardly worth recording . . . were it not that these early notions and precedents, however vague they seem to us, were to be much used by the protagonists of privilege at a later time. Strong bulwarks of liberty have sometimes been erected on slight foundations. The truth is that in the late fourteenth and early fifteenth centuries Parliament was so little aware of its possible powers that it did not conceive clearly the dangers besetting it. . . . How little conception of a constitutional principle there was is best shown by a consideration of the period of nearly a century and a half that follows.[3]

It is far easier to show the breach than the observance of any lines of conduct looking to the preservation of the privilege that had been tried in the earlier time. Then in 1576 Peter Wentworth's great words sounded the note of a new era and a conflict not interrupted until not only freedom of speech but its corollary, the supremacy of Parliament, had been won. The Bill of Rights says the last word upon the subject when it declares: "That the freedom of speech and debates or proceedings in parliament ought not to be impeached or questioned in any court or place out of parliament."[1]

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[1] Cited in Stubbs, *Constitutional History*, § 451.

[2] *Ibid.*

[3] W. and N., pp. 170, 171.

We are in the habit of talking of a "Lancastrian constitution" and thinking of that period as a time when the Commons gained a premature control of king and Council, and in ways which hint of much that is modern in the English form of government. Was the period so peculiar and important in these ways that we should so think of it? Or is the Lancastrian constitution mostly a myth which exists because "Elizabethan and seventeenth-century orators had a knack for weaving from thin Lancastrian threads thick cords to bind their kings?" Did the Commons play as large a part as, from the Rolls of Parliament, they appear to have played? These are questions which are being asked by present-day investigators, and it is impossible yet to answer them. It is true that Parliament had gained power slowly in the fourteenth century, and that in the early fifteenth, with Lancastrian kings having a parliamentary title and constantly dependent upon Parliament for money, it rapidly gained control of the administration. And it is also true, and an important further point, that while the king was being thus limited, a formidable power was gathering in the hands of the higher nobility; in some respects, it was a rebirth of feudalism. It has been noticed how the Hundred Years' War brought forth generations of lawless nobles, whose misdeeds are usually summarised under the practices of livery and maintenance.[2] All the guarantees of liberty which lay in jury trial, in an uncorrupted bench, and elections to Parliament were weakened. Parliament was getting control over the king, but it was not getting, and was not of a character to get, control over the thing that was then more dangerous.

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[1] A. and S., p. 465.

[2] See above, pp. 209, 388.

The activity of parliaments from the middle of the fourteenth to the middle of the fifteenth centuries was transitory and unsubstantial; it was due to the weakness of the monarchy and the factions of the peerage, and was not based upon any broad national ambition for self-government or sense of political responsibility.[1]

The replacing of the Lancastrians by the legitimist Yorkists and the far more important and masterful Tudors has sometimes been regretted as constitutional retrogression. But at the end of the fifteenth century England's hope lay in an executive strong enough to humble the nobility. The Wars of the Roses marked a bad time. They were the nobles' own wars; the rest of the people suffered, but were not interested. There was nothing to do but wait until enough blood had been let to relax the vigour in that nexus of old family feuds and personal bitternesses which dated clear back to the reign of Edward II. All parts of the constitution fared badly enough. If asked which suffered the least, one must probably say, the House of Commons. It was pretty openly and regularly packed, and reflected the sentiments now of the red, now of the white rose. But it is significant that it was packed; the party in power did not attempt directly to override it. And this was also true after the Yorkists had gained the throne. Legitimists as they were, they had to have Parliaments, and they did not think of the House of Commons as something to be ignored or browbeaten; rather as a part of the government to be reckoned with and manipulated. And surely the House of Commons reached 1485 much less shaken than the House of Lords; it had stood for the most substantial part of England's population; the momentous union of knight and burgess had vindicated itself. There was a refreshing and immediate clearing of the air when the first Tudor was on the throne. He seemed the embodiment of sober and orderly strength. His coming was a prophecy that the destructive forces fostered by the long wars would be controlled, and that England's medieval constitution would continue until Englishmen had learned to value it and strive for it. The field was cleared for the conflict between the great middle class, trained in government for many centuries, and the succession of incomparable Tudor and Stuart personalities.

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[1] Pollard, *Evolution of Parliament*, p. 319.

Of the features of the constitution characteristic of the modern period it is safe to say that the most matured by 1485 were the courts and common law. These were already venerable, with traditions—long the subject of thought, and of writings that had become classical. And on the whole the courts had developed a procedure that safeguarded the subject from oppression. The substance of *habeas corpus* was already in existence; unanimous jury verdicts were necessary to convict in all serious criminal charges, and questions of fact in civil suits were usually determined in the same way; public officials, even when acting directly for the king, were not immune from damage suits or indeed from trial on criminal accusations, and the facts were judged by juries. The king was clearly under the law, though just what law and who upon all occasions should hold him to it had not been worked out. In this connection the baronage had played a part in England that the corresponding class had played in no other country. When we say that the government of England in the middle ages was becoming constitutional we mean that it was becoming aristocratic. But when the barons fought against the king, it was not, generally speaking, that they had a different machinery of government to put in operation; they were ready to accept the institutions, forms, and methods which the king and his more personal advisers had been making. What they wished was to control those institutions and put their own men into the places of trust and power. Baronial victories did not, as a rule, result in decay and weakening of the government; a large part of the more professional staff in the various departments were allowed to continue their work undisturbed, whether the great ministers, the heads of those departments, were essentially baronial or royal appointees. We may say that the baronage was not national or popular—only, consciously or unconsciously, posed as such. Yet the birth in the thirteenth century of a conception of national, popular control of government and its appropriation by the baronage were events of great significance for the future. While not going the length of some present-day scholars and regarding Parliament to the end of the middle ages as a kind of addendum to baronial factions, yet the voice of the aristocracy was heard in Parliament as no other voice. The English barons grasped after privilege and power and there are dark places in their history, but on the whole from the time of Magna Carta they played a game that was constructive and upon a high plane of intelligence. How they came to be what they were and their share in the making of the English constitution have yet to be adequately told. English kings had made no standing army; to all appearance they had not tried. Perhaps the baronial opposition had been a force too steady and well-considered to have given them, after the decline of the feudal army, an opportunity. But since the king could not use a militia to take taxes without consent, the people were safe from this kind of despotism, except the rich who might be reached through forced loans or benevolences. Also the now venerable principle that there could be no taxation without consent of Parliament no doubt had some hold even upon the minds of kings. The part played by the people in English government went back, in some of its phases, beyond record; but since the Conquest the use of the people, especially in local government, had worked into a settled royal policy. A share in government, even at the end of the middle ages, was not felt to be a privilege except in the case of a few: the great ministers, possibly some members of Parliament or the local magistrates, and minor officials who received stipends and to whom government service was a means of livelihood.

But to the great mass it was a burden so long borne as to be a commonplace of life, as much a heavy accompaniment of life as bodily ills and weariness. A share in government was not a boon, but a duty that someone must do; and it had been the king's will that very many should share in it. This long training surely did much to make modern democracy possible. Professor Henry Jones Ford has recently said

> Where liberal institutions have been successful they seem to have been dependent upon some past discipline maintained by coercive authority, and as that decays liberal institutions seem to lose their ability to discharge the primary duties of government.[1]

Are we using up the political virtue stored during this past discipline as we are using up the fuel deposited in a past geologic age, and are we coming to a time when we must look to some new source of supply?

In what were fifteenth-century people interested? Not to any great extent in forms of government, in theories of public policy. These things which in modern times have seemed worth the extreme of personal sacrifice touched the minds of but very few. There were Fortescue and a few others, to whom government was a study, but political theory had not been and was not an important force. Political problems were gotten through and crises met on the basis of isolated precedent, with some instinct of fair-play and opposition to tyranny which had become the flavour of the whole working constitution; but with the guidance or incentive of few general principles conceived to have values and sanctions in themselves. If there were ringing words, impassioned utterances, they were likely to be for faction or family, for national or personal loyalties; they were not for limited monarchy *per se*, not for the people, not for liberty—in a word, they were for some people and some things, not for abstractions.

[1] *Representative Government*, p. 307.

When Peter Wentworth, in 1576, began his great speech with "Sweet is the name of Liberty, but the thing itself a value beyond all inestimable treasure," he was saying what could not have been said the century before. As remarked at the beginning of this book, the period with which it is concerned is primarily that of structural growth in the constitution, also the time when many generations of Englishmen got their hard discipline in government; but full political self-consciousness, the questioning of grounds of authority—first in the church and then in the state—and the struggle for political liberty belong to the centuries following. The final outlawing of absolute monarchy in the seventeenth century and the principles of popular government then set forth were made possible by the structure of the medieval constitution, acted upon by maturing political thought and democratic ideals sprung from the Protestant Revolution, and also by the English people's long training in public duties and responsibilities.

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